No. 352

In the Supreme Court of the United States

October Term, 1950

The Timken Roller Bearing Company,
Appellant

v.

The United States of America

On Appeal from the United States District Court for the Northern District of Ohio

Brief for the United States

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THE TIMKEN ROLLER BEARING COMPANY,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 958) is reported in 83 F. Supp. 284.

JURISDICTION

The final judgment of the district court was entered on February 15, 1950 (R. 1172), and motions for a new trial and amendment of findings and conclusions were denied on June 14, 1950 (R. 1252). The petition for appeal was filed and allowed on July 28, 1950 (R. 1253–1255). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32

Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. Probable jurisdiction was noted on November 6, 1950 (R. 1327).

QUESTIONS PRESENTED

1. Whether appellant has combined with British Timken and French Timken to restrain foreign commerce by allocating world markets, fixing prices, and restricting competition in the sale of anti-friction bearings.

2. Whether the restraints are reasonable as ancillary to a "joint venture" or to the "licensing" of the trademark "Timken".

3. Whether the findings and evidence support the judgment.

4. Whether the divestiture and injunctive relief ordered by the district court are appropriate and necessary.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in pertinent part as follows:

> SECTION 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * * [15 U. S. C. 1.]

* * * * *

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. * * * [15 U. S. C. 3.]

SEC. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U. S. C. 4.]

STATEMENT

THE PROCEEDINGS BELOW

This is a civil action brought by the United States under Section 4 of the Sherman Act. The amended complaint, filed December 15, 1947, charged appellant and two foreign corporations, which were named co-conspirators but not defend-

ants (British Timken, Limited, and Societe Anonyme Française Timken, herein referred to as British Timken and French Timken, respectively), with engaging in a combination and conspiracy to restrain interstate and foreign commerce, in violation of Sections 1 and 3 of the Sherman Act, by entering into agreements and planning and acting together to eliminate competition among themselves and others in the manufacture and sale of antifriction bearings in all markets of the world (R. 25).

The amended complaint prayed for adjudication that the conspiracy and contracts to eliminate competition were illegal, cancellation of the illegal contracts, injunctions against continuation of the restrictive practices and against appellant's transferring the trade-mark "Timken" to British Timken or French Timken so as to exclude appellant from using it anywhere in the world, an order that appellant divest itself of its stock holdings and other financial interests, direct and indirect, in the co-conspirator corporations, and such other relief as might be required to dissipate the effects of the conspiracy (R. 23–25).

The district court, after a trial extending from March 22 to April 27, 1948, filed an opinion on March 3, 1949 (R. 958), which it thereafter adopted as its findings of fact and conclusions of law (R. 1020). The court found that appellant, together with British Timken and French Timken, had combined and conspired to restrain

foreign commerce in anti-friction bearings, in violation of Sections 1 and 3 of the Sherman Act, by (a) dividing the world among themselves into exclusive sales and production territories (Fdg.,[1] par. 117, R. 994; Concls., pars. 128, 129, R. 997), (b) fixing prices for products sold under limited exceptions to the division of territories (Fdg., par. 117, R. 994; Concl., par. 132, R. 998), (c) cooperating to eliminate the competition of outsiders (Fdgs., pars. 117, 119, R. 994, 995; Concl., par. 134, R. 999), and (d) participating in foreign cartels which restricted exports by United States producers (Fdgs., pars. 117, 126, R. 994, 996; Concls., pars. 126, 135, R. 996, 999–1000). The Court also found that the exclusive exchange of patents and "know-how" among appellant and its co-conspirators, together with restrictions imposed by them upon the use of the trade-mark "Timken," were integral parts of the general scheme to suppress trade (Fdg., par. 137, R. 1000).

All of the various defenses raised by appellant were considered and rejected by the district court. The contentions that there was no intent to restrain trade, that the restraints were reasonable and ancillary to appellant's purchase of British Timken and French Timken stock, and resulted

[1] References to statements in the court's opinion which clearly constitute findings of fact or conclusions of law are so designated in this brief. Other references to the opinion of the court are designated by paragraph number and record page only.

from transactions entered into for legitimate reasons, were rejected by an explicit, comprehensive finding that "all that the evidence discloses is an intent to form a smoothly operating combination to control commerce in the tapered-bearing industry throughout the entire world" (Fdg., par. 146, R. 1002; and see Fdgs., pars. 147, 148, R. 1002). The court concluded that the restraints involved were unlawful *per se* (Concls., pars. 142–3, R. 1001) and could not be justified by "good business reasons" (Concl., par. 145, R. 1002).

The contention that the restraints of territorial allocation and price fixing were reasonably ancillary to a "joint venture" was rejected on several grounds. The court found that no joint venture existed (Fdgs., pars., 156–160, R. 1004–5, and it concluded that had one existed it would not have justified continuation of a pre-existing combination designed to allocate exclusive sales territories, to fix prices, and to eliminate competition both within and without the combination (Concls., pars, 161–3, R. 1005–6). And it found further that the restrictive agreements were not, in any event, actually ancillary to the joint venture (assuming one existed), but were made for the specific purpose of eliminating competition (Fdgs., pars. 150, 154–5, R. 1003, 1004).

The defense that the restraints imposed were reasonably ancillary to the contract provisions for transfer of know-how was likewise overruled. Because the court concluded that even the pos-

session of a patent monopoly would not have justified restraints of the character here involved, the lesser interest in protecting know-how was held clearly inadequate as a justification (Concls., pars. 170, 172–8, R. 1007–9).[2]

A similar finding was reached with respect to the claim that the restraints were permissible as ancillary to appellant's licensing of the trade-mark "Timken" to British Timken and French Timken (Op., pars. 179, 180, R. 1009). The court found that the restrictive trade-mark provisions of the various contracts were secondary to the primary purpose of allocating trade territories and preventing competition in the sale of bearings (Fdgs., pars. 183, 187–8, R. 1009, 1010–1), that the restraints could not in any event be justified even by a patent monopoly, and that they could certainly not be justified as sanctioned by the lesser rights of the owner of a trade-mark (Concls., pars. 195–200, R. 1012–4). Moreover, even assuming that the restraints were ancillary to trade-mark licensing, the court ruled that appellant was not the legal or "equitable" owner of

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[2] The court said (Concl., par. 177, R. 1008):

"We are, here, confronted with a situation, wherein a patentee upon the expiration of its patent monopoly, seeks to justify the perpetuation of the favored position it enjoyed by virtue of the patent through the ingenious theory of furnishing know-how. If lawful restraints and monopolies could be predicated on the ownership of know-how they could last ad infinitum. This Court cannot subscribe to such unharnessed privilege."

the mark in many countries within the territory allotted by the contracts to British Timken and French Timken, and, therefore, could not license the mark in such areas (Fdgs., pars. 182, 183, R. 1009–10; Concls., pars. 189, 190, R. 1011).

Appellant's argument (Op., pars. 201–203, R. 1014–5) that equitable relief would be useless, since no substantial United States foreign trade in anti-friction bearings on a competitive price basis has existed for many years, but such trade has been and is impossible as a result of chaotic economic conditions, tariff and currency regulations, government restrictions on imports and exports and sales resistance to foreign made products, was likewise held insufficient, legally and factually. The court held that such obstacles have always existed to our foreign trade, which is subject to fluctuation with political and social changes, and that the provisions of the Sherman Act pertaining to free competition with foreign nations nevertheless continue to be applicable to restraints on such competition (Fdg., par. 205, R. 1015; Concl., par. 209, R. 1017). The court further found that there was and is actual and potential competition in the international roller bearing market, and that such competition would have been greater but for the restrictions imposed upon it by the appellant and its co-conspirators (Fdgs., pars. 202, 204, 206–8, R. 1014, 1015–17).

On February 15, 1950, after the filing of briefs and an extensive hearing on the relief to be

granted, the district court entered its final judgment, which contained, among other provisions, an adjudication that the conspiracy and the described contracts were illegal, injunctions against practices which formed part of the conspiracy or might lead to its revival, an order that appellant divest itself within two years of its interests in the co-conspirator corporations, and an injunction against appellant's acquiring, "through the exercise of any option, or otherwise," any interest in those companies (R. 1179). A motion for a new trial was denied (R. 1252), and the present appeal was taken.[3]

The relief provisions of the final judgment which are apparently challenged on this appeal are as follows (R. 1175–9):

> V. Defendant is hereby enjoined and restrained from entering into, performing, adopting, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under, any combination, conspiracy, contract, agreement, arrangement, understanding, or concerted plan of action with British Timken, French Timken, or any subsidiary, successor, assign, agent, sales representative or distributor thereof:
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> * * * * *

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[3] After this Court had noted probable jurisdiction of this appeal, appellant on January 24, 1951, moved the district court to request leave of this Court to receive additional evidence, make additional findings of fact and conclusions of law, and vacate all or part of its final judgment of February 15, 1950. A hearing was held in the district court on Feb-

F. To fix, maintain or adhere to prices or price ranges, or other terms and conditions of sale or resale of anti-friction bearings produced by defendant for sale or other distribution in any territory or market, or produced by any other person for sale or other distribution in the United States.

G. To receive, grant, disclose, render available or exchange, in such a way as to deny any third person access thereto, any assignment, license or grant of immunity under a patent or patent application, relating to anti-friction bearings;

H. To receive, grant, disclose, render available or exchange, in such a way as to deny any third person access thereto, (1) information, advice, assistance or rights with respect to any invention, discovery, improvement, practice, formula, pattern, device, process, method, or other technical information, relating to the production of anti-friction bearings, or (2) any material or machinery used in the production of anti-friction bearings, or any information, advice, assistance or rights with respect to any such material or machinery.

VI. Defendant is hereby enjoined and restrained from:

* * * * *

B. Refusing to sell anti-friction bearings to any person at prices and on terms and

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ruary 14, 1951; and on April 10, 1951, the court denied this motion.

conditions of sale corresponding to those regularly offered to purchasers of the same classification for resale or other distribution in defendant's territory, as herein defined, where the reason for such refusal is that such bearings are for resale or other distribution in British territory or French territory, as herein defined;

* * * * *

VII. Defendant is hereby enjoined and restrained from entering into, performing, enforcing, adhering to, maintaining, furthering, or renewing, directly or indirectly, any contract, agreement, combination, understanding or arrangement with British Timken and/or French Timken, or any subsidiary, successor, assign, agent, sales representative or distributor thereof which provides for:

A. An assignment, license or grant of immunity under any patent or patent application;

B. The receipt, grant, disclosure, rendering available or exchange of information, advice, assistance or rights with respect to any invention, discovery, improvement, practice, formula, pattern, device, process, method or other technical information relating to the production of anti-friction bearings, or of any material or machinery used in the production of anti-friction bearings, or of any information, advice, assistance or rights with respect to any such material or machinery; or

C. The transfer of any right or immunity under a trade mark or name, relating to the production of anti-friction bearings, upon the condition or requirement that British Timken and/or French Timken, or any subsidiary, successor, assign, agent, sales representative or distributor thereof shall:

1. allocate or divide territories or markets for the production, sale or other distribution of anti-friction bearings;

2. limit, restrain or prevent importation into or exportation from the United States of anti-friction bearings;

* * * * *

4. refrain from competing or leave any person free from competition in the production, sale or other distribution of anti-friction bearings in any territory or market;

5. exclude any producer or distributor from any market for anti-friction bearings, or interfere with or restrict any producer or distributor in competing in any such maket;

6. maintain or adhere to fixed prices or price ranges, or other terms and conditions of sale or resale of anti-friction bearings;

7. receive, grant, disclose, render available or exchange, in such a way as to deny any third person access thereto, any assignment, license or grant of immunity under a patent or patent application, relating to anti-friction bearings;

8. receive, grant, disclose, render available or exchange, in such a way as to deny any third person access thereto, (a) information, advice, assistance, or rights with respect to any invention, discovery, improvement, practice, formula, pattern, device, process, method, or other technical information relating to the production of anti-friction bearings, or (b) any material or machinery used in the production of anti-friction bearings, or any information, advice, assistance or rights with respect to such material or machinery;

* * * * *

VIII. A. Within two years from the date of this judgment, defendant shall divest itself of all stock holdings and other financial interests, direct or indirect, in British Timken and French Timken. Within one year from the date of this judgment, defendant shall present to the Court for its approval a plan for such divestiture.

B. Defendant is hereby enjoined and restrained, from the date of this judgment, from:[4]

1. Acquiring, directly or indirectly, any ownership interest in (by purchase or acquisition of assets or securities, or through the exercise of any option, or otherwise), or any control over, British Timken or French Timken, or any subsidiary, successor or assign thereof;

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[4] As pointed out *infra*, p. 148, the Government questions whether the appellant is in a position to challenge subsection B of Section VIII.

2. Exercising any influence or control over the production, sales or other business policies of British Timken or French Timken, or any subsidiary, successor, assign, agent, sales representative, or distributor thereof;

3. Causing, authorizing or knowingly permitting any officer, director, or employee of defendant or its subsidiaries to serve as an officer, director, or employee of British Timken or French Timken or of any subsidiary, successor, assign, agent, sales representative, or distributor thereof.

IX. Defendant is hereby enjoined from refusing to sell anti-friction bearings to any person or discriminating as to availability and prices, terms, and conditions of sale of such bearings or failing to provide services and assistance relating to the distribution or use of such bearings comparable to the services and assistance made available to distributors and users of such bearings in defendant's territory, where the reason for such refusal, discrimination, or failure is that such bearings are for use, resale, or other distribution, either in their original form or incorporated in another product, in some country or area other than defendant's territory as herein defined.

The Evidence

The undisputed documentary evidence furnishes, in our view, complete support for the findings and conclusions of the district court with respect to

the restraints imposed by appellant. Moreover, review on this appeal does not encompass detailed scrutiny of the factual inferences of intent (to the extent relevant) which were drawn by the trial judge from the entire record. *United States* v. *Yellow Cab Co.*, 338 U. S. 338. Accordingly, the detailed recital of the background, development, and operation of the conspiracy which follows is included only because of its relevance to the questions of the appropriateness of the relief ordered by the district court.

A. THE APPELLANT, THE CO-CONSPIRATORS, AND THEIR PRODUCTS

Appellant is an Ohio corporation with its main offices in Canton, Ohio (Fdg., par. 6, R. 960; Ans., par. 3, R. 25, 26; R. 458), and its principal plants in Canton and Columbus, Ohio (Fdg., par. 6, R. 960; Ans., pars. 2, 13, R. 26, 28). It is "many times over" the largest manufacturer of tapered roller bearings in the world (Fdgs., pars. 10, 35, R. 960, 965–6; Gov. Ex. 1, not printed;[5] Ans., par. 11, R. 27) and has been since 1904 (Fdg., par. 35, R. 965–6; R. 46).

A tapered roller bearing is a type of anti-friction bearing (Fdg., par. 18, R. 962), which is a device for reducing friction by mechanical means between moving parts in machines (Fdg., par. 17,

[5] The parties have stipulated that exhibits which are of record but were not printed may be referred to in the briefs and argument (R. 1333).

R. 961–2). Tapered roller bearings consist of a circular group of conical or truncated conical steel rollers revolving between two circular steel raceways, which in turn are inserted between the moving parts of the machine.[6] Tapered roller bearings are extensively used in many industrial products containing rotating parts, such as trucks, automobiles, farm machinery, and railroad rolling stock (Fdg., par. 16, R. 961; R. 40–1). Though they compete to some extent with other types of anti-friction bearings and to a lesser extent with friction bearings, tapered roller bearings are free from competition for certain uses.[7]

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[6] Fdgs., pars. 17, 18, R. 961–2; Gov. Exs. 1, 2, p. 6, not printed; Def. Exs. 49–C, 50–A to G, not printed; R. 37, 39–40, 112. The other principal types of anti-friction bearings are straight roller bearings, which have cylindrical steel rollers, and ball bearings, which have steel spheres (Fdgs., pars. 17, 18, R. 961–2; Gov. Exs. 1, 2, p. 6, not printed; Def. Exs. 49–C, 50–A to G, not printed; R. 37, 39–40, 112). A friction bearing consists of a metal sleeve which slides directly over a shaft; oil or other filmy substances, rather than rotating parts, are used to reduce friction between the moving sleeve and shaft (Fdg. 17, R. 961–2; Ans., par. 8, R. 27; R. 475–6, 481).

[7] Fdgs., pars. 19, 20, R. 962; R. 37–8, 40–1. For example, because of their design, they are capable of supporting heavy loads which ball bearings could not support except in a size which would be commercially and industrially impractical (R. 59–60). This is true with respect to railroad cars (R. 489). Tapered roller bearings are also capable of carrying a heavier sidewise thrust load than other types of bearings (R. 40).

Even in instances where ball or straight roller bearings may be adequate alternatives for tapered roller bearings, once the tapered roller bearing is incorporated into the

Appellant's share of the United States annual production of tapered roller bearings has ranged in recent years from 71 to over 80 percent.[8] Its gross sales were approximately $77,097,756 in 1947 (Fdg., par. 10, R. 960; R. 541–3). Its sales of tapered roller bearings for "original installation" constitute approximately 95 per cent of its total bearings sales, while "replacement" or "service" sales make up the remaining 5 per cent (Fdg., par. 21, R. 962; R. 500–1).

British Timken, named as a co-conspirator but not as a defendant, is a British joint stock company with its principal offices and plant at Birmingham, England (Fdg., par. 7, R. 960; Ans., par. 4, R. 26). It is the largest manufacturer and seller of tapered roller bearings in England (Fdgs., pars. 13, 36, R. 961, 966). Though its position once dropped to as low as 70 per cent, in 1927 and at the time of trial it had more than 90 percent of such production (Fdg., par. 13, R. 961;

design of equipment, ball or straight bearings thereupon become noncompetitive, since these other types of bearings cannot be substituted without redesign of the equipment (Fdg., par. 20, R. 262; R. 210–1, 296–7). In addition, in "replacement" sales of tapered bearings there is no competition from other types of bearings, where the original installation was a tapered bearing (Fdg., par. 20, R. 962; R. 45, 65–6).

[8] Fdg., par. 11, R. 960–1; Gov. Exs. 4, 5, 135 (not printed), 138, R. 1333, 1334, 1557. Appellant makes no other type of anti-friction bearings (Fdg., par. 6, R. 960; R. 460). Appellant also makes alloy steel, seamless tubing, and removable rock bits (Fdg., par. 6, R. 960).

R. 106-7). Its gross sales for 1947 were approximately $14,700,000.[9]

At the time when judgment below was entered, appellant owned 30.25% of the ordinary shares and 1% of the preferred shares of British Timken.[10]

French Timken, also named as a co-conspirator but not as a defendant, is a French corporation with its principal offices at Asnieres, France (Fdg., par. 8, R. 960). It is the largest manufacturer and seller of tapered roller bearings in France.[11] Its 1947 sales amounted to 270,692,-963.88 francs or $2,274,723 (Fdg., par. 14, R. 961; Def. Ex. 35, R. 1846).

At the time of the judgment, appellant owned 50% of the outstanding shares of French Timken,[12] and promissory notes from French Timken on which approximately $241,000 is now

[9] Fdg., par. 13, R. 961. Since 1933 or 1934 British Timken has also manufactured, through its subsidiary, Fischer Bearing Company, ball and straight roller bearings (Fdg., par. 7, R. 960; R. 107). The gross sales for 1947, given above, include those of Fischer.

[10] Fdg., par. 66, R. 971; R. 911-2. Appellant's acquisition of its interest held at the time of judgment in British Timken is described on pp. 28-32, *infra*, and in French Timken on pp. 30, 36, *infra*.

[11] Fdg., par. 14, R. 96; R. 117. French Timken has never made ball or straight roller bearings (R. 113), since it is prohibited from doing so by its agreements with appellant and British Timken (Def. Ex. 27, par. 6, R. 1771, 1776; Def. Ex. 28, par. 5, R. 1780, 1783).

[12] Fdgs., pars. 54, 66, R. 969, 971; Def. Ex. 186, R. 2298; Ans., par. 5, R. 26; R. 912-3.

owed (R. 1062–3). In addition, appellant holds a $120,000 note from M. B. U. Dewar, secured by a pledge of his 50% stock interest in French Timken (Def. Ex. 228, R. 2487 [redacted]; 1063).[13]

B. THE BACKGROUND OF THE CONSPIRACY

The court found that the present conspiracy was the natural outgrowth of agreements dating back to 1909 which divided world markets and eliminated competition (Fdg., par. 120, R. 995). In 1909 appellant entered into two contracts (Def. Exs. 189, 190, R. 2305, 2322) with Electric & Ordnance Accessories Company, Limited a predecessor of British Timken (Fdg., par. 24, R. 962).

The 1909 agreements provided, in substance, for:

> (1) A division of world production and sales territories, whereby appellant agreed not to manufacture or sell roller bearings (or to sell such bearings to others for resale) in Europe or the British Empire (except Canada), and E&OA agreed not to manufacture or sell outside of these territories.[14]

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[13] See note 10.

[14] Fdgs., pars. 24–27, R. 962–4; Def. Ex. 189, Art. 2, 15, R. 2306, 2319; Def. Ex. 190, pars. 6, 39, R. 2322, 2325, 2335. Both contracts provided that appellant should not, directly or indirectly, manufacture or sell any roller bearings, whether patented or otherwise, in the territory "licensed" to E&OA, nor sell any roller bearings to others for shipment into E&OA territory except as part of complete automobiles made in the United States (Def. Ex. 189, Art. 2, R. 2306;

(2) The compulsory and exclusive use by E&OA of the mark "Timken" on roller bearings made or sold by it.[15]

(3) The fixing of minimum prices at which E&OA could sell within its territory.[16]

(4) The furnishing of manufacturing information by appellant to E&OA, the compulsory use of such information by E&OA, and the right of appellant to adopt any improvements made by E&OA.[17]

Though the two contracts were cast in the form of patent licenses from appellant to E&OA,[18] the restrictions applied to all roller bearings, whether patented or not, and to territories where appellant had no patent rights.[19] The court held that the 1909 agreements were themselves illegal because,

Def. Ex. 190, par. 6, R. 2325–6). E&OA likewise agreed in each contract not to manufacture or sell "any roller bearings" outside its territory, nor to sell them to others for shipment outside its territory, except as parts of vehicles made in its territory. (Def. Ex. 189, Art. 15, R. 2319; Def. Ex. 190, par. 39, R. 2335.)

[15] Fdgs., pars. 25, 27, 187, R. 963, 964, 1010; Def. Ex. 189, Art. 11, R. 2316; Def. Ex. 190, par. 32, R. 2333.

[16] Fdgs., pars. 25, 27, R. 963, 964; Def. Ex. 189, Art. 14, R. 2318; Def. Ex. 190, par. 37, R. 2335.

[17] Fdgs., pars. 25, 27, R. 963, 964; Def. Ex. 189, Art. 4, 10, 13, R. 2307, 2316, 2317; Def. Ex. 190, pars. 31, 34, R. 2333, 2334.

[18] The principal license covered three existing British patents of appellant, as well as all future patents it acquired which related to roller bearings (Fdg., par. 24, R. 962; Def. Ex. 189, Art. 2, R. 2306).

[19] Fdgs., pars. 24–27, R. 962, 964; Def. Ex. 189, Art. 1, 2, R. 2305, 2306; Def. Ex. 190, pars. 3, 5, R. 2324, 2325.

though patent licenses, they applied to products and territories beyond the scope of existing patent rights, and included future developments and inventions, in the industry (Concls., pars. 120, 170, 173–4, R. 995, 1007, 1008). Moreover, the 1909 agreements set the pattern for the restraints which continued long after the expiration of the patents.[20]

Pursuant to these two contracts, E&OA began the production of bearings in Great Britain in 1909 (R. 427), and thereafter all bearings sold by E&OA and its successor, British Timken, were sold under the name "Timken" (Fdgs., pars. 96, 124, R. 987, 996; R. 430, 440). Appellant, which had not before 1909 sold any bearings in the territories allotted to E&OA by the two contracts, under the name "Timken" or otherwise, was after that date prohibited from doing so by the contracts, to which it gave rigid adherence (Fdgs., pars. 70, 72, 86, 87, R. 972, 973, 983, 984). British Timken by the use of the name in the sale of its tapered roller bearings thus acquired the common law ownership of the name as a trademark in Great Britain (R. 608), and later became the registered owner (*supra*, p. 26, n. 36).

On April 6, 1920, the agreements of 1909 between appellant and E&OA (Def. Exs. 189, 190, R. 2305, 2322) were modified by two contracts (Def. Exs. 191, 192, R. 2338, 2343) between

[20] Fdg., par. 153, R. 1003–4. The basic patents had all expired by 1924 (Fdgs., pars. 31, 188, R. 965, 1010–1; Def. Exs. 82, 242; R. 1965, 2662; R. 220).

appellant and another Vickers subsidiary, Wolseley Motors, Limited (hereinafter called "Wolseley"), providing for the transfer to Wolseley of the E&OA licenses of 1909 (Fdg., par. 28, R. 964; R. 230). Later, on June 4, 1920, British Timken was organized as a wholly-owned subsidiary of Wolseley, and Wolseley's rights under the two 1920 contracts were assigned to British Timken (Fdgs., pars. 31, 32, R. 965; Def. Ex. 199, R. 2359).

The 1920 contracts, though retaining substantially all of the terms of the 1909 contracts, made certain modifications in addition to the assignment to Wolseley (Fdg., par. 28, R. 964). One of the principal changes was an exception to permit appellant to sell bearings to manufacturers in its own territory for export into Wolseley's territory, but only for use in such manufacturer's own products.[21] Wolseley was granted reciprocal rights.[22] The contracts provided, however, that bearings made in the territory of one of the parties and sold for use in the territory of the other should "not be sold at prices which shall be unreasonable or unfair to the party in whose territory the roller bearings are sold." [23]

[21] Fdg., par. 28, R. 964; Def. Ex. 191, par. 3, R. 2338, 2339; Def. Ex. 192, par. 3, R. 2343, 2344.

[22] Fdg., par. 28, R. 964; Def. Ex. 191, par. 4, R. 2338, 2340; Def. Ex. 192, par. 4, R. 2344.

[23] Fdg., par. 29, R. 964; Def. Ex. 191, par. 9, R. 2341; Def. Ex. 192, par. 9, R. 2345.

Wolseley was required to use the name "Timken" on its bearings as was E&OA under the 1909 contracts,[24] but in the event the contracts were rescinded by appellant under certain listed conditions Wolseley was obligated to abandon the use of the name "Timken."[25]

By 1921 appellant had become aware that its covenants not to make or sell bearings in territories allotted to others resulted in others registering and owning the mark "Timken" in those territories,[26] so that appellant could not use the mark in many areas of the world.[27] In 1916 a German citizen named Prausnitzer had obtained in Germany the first registration in any country of the word "Timken" as a trade-mark for anti-friction bearings.[28] In 1921 the trade-mark "Timken" was registered in France and the French colonies by Societe de Mechanique de Gennevilliers (hereinafter called SMG),[29] the sole

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[24] *Supra*, p. 20; Fdg., par. 187, R. 1010; Def. Ex. 191, pars. 3 & 4, R. 2339, 2340; Def. Ex. 192, pars. 3 & 4, R. 2344.

[25] Fdg., par. 30, R. 964; Def. Ex. 191, par. 10, R. 2341; Def. Ex. 192, par. 10, R. 2346.

[26] Fdg., par. 183, R. 1009; Def. Ex. 63, R. 1947–8; Def. Exs. 77, 79, 80, 89, R. 1961, 1963, 1964, 1993.

[27] Fdg., par. 182, R. 1009. Even in those instances where appellant obtained registrations outside its allotted territory, these registrations were subject to being set aside, since British Timken could have established prior use (R. 609–10, 613–4; see Fdg., par. 182, R. 1009).

[28] Fdg., par. 182, R. 1009; Def. Ex. 87, R. 1972; R. 117–8.

[29] Fdgs., pars. 53, 182, R. 969, 1009; R. 120–1, 450; Def. Exs. 37, 38, 39, R. 1849, 1851, 1859.

French producer of tapered roller bearings.[30] In 1921 appellant was advised by counsel that it had no rights to the mark "Timken" in the United Kingdom, as a result of prior use there by British Timken and its predecessors.[31] Appellant then decided to obtain such rights if possible through cooperation with British Timken (Def. Ex. 80, R. 1964). Throughout the years after 1920, appellant exerted considerable effort to remedy its

[30] Fdgs., pars. 53, 182, R. 969, 1009; R. 111–2. SMG was operating under a sublicense from E&OA (Fdgs., pars. 53, 182, R. 969, 1009; see Def. Ex. 194, pars. 3, 4, R. 2347, 2348–9). The registration in France by SMG was an unpleasant "surprise" to appellant (Def. Exs. 81, 82, R. 1965; R. 586).

[31] Def. Ex. 77, R. 1961; see also Def. Exs. 63, 79, 89, R. 1947, 1963, 1993. Appellant's British trade-mark solicitors explained the situation as follows (Def. Ex. 77, R. 1961):

"Now the idea of the registration of a trade-mark is not to protect the proprietor of the mark but to protect the general public by assuring them that they are obtaining the goods of a particular manufacturer. In the present case the goods actually sold in this country are not manufactured by the Timken Roller Bearing Company, but have been manufactured first of all by the Electric & Ordnance Accessories Company, Limited, then by Wolseley Motors Limited and now by British Timken, Ltd., and if we are to apply under part B of the Act, it seems to us that the application should be made in the name of the British Timken, Ltd., as they would have to prove actual use of the mark for more than two years either by themselves or their predecessors in business. Now if registered in the name of the British Timken, Ltd., your clients would have no rights in this trade mark unless some specific arrangements were made whereby, on termination of the agreement under which these rollers are at the present being manufactured here, the good will of the business in respect thereof must revert to the Timken Roller Bearing Company."

dubious trade-mark position in the various territories allotted by agreement to others.[32]

On December 31, 1924, and January 1, 1925, respectively, appellant entered into two contracts

[32] Fdgs., pars. 183–4, 186, R. 1009–1010; Def. Exs. 79, 80, 83, 89, 91–4, 97, 98, 99, 102–106, R. 1963, 1964, 1966, 1993, 1996–2000, 2002, 2003, 2005, 2010–2015; R. 585–6, 594, 595–6, 609–10, 613–5. On July 30, 1925, appellant was advised (a) that its application for registration in Germany had been successfully opposed by Prausnitzer; (b) that appellant could not register the name in France because SMG had already registered it and that appellant also had no right to registration in Great Britain and Ireland, "because the laws of those countries seemed to require actual use of the trade-mark before registration" (Def. Ex. 89).

Appellant's trade-mark problems in British Timken territory were summarized by its counsel in January 1927 as follows (Gov. Ex. 100, R. 1478):

"Your application in New Zealand has been unsuccessful by reason of your inability to obtain affidavits as to ownership of the mark, the New Zealand trade recognizing the mark as being the property of British Timken. In Great Britain, it seems impossible for you to obtain registration in your name. In both cases, it might be possible to obtain registration in the name of British Timken, with a promise to assign the registrations to you; but we have not done this because of the provision against assignment of a trade-mark registration separate and apart from the business. In France and Germany, representatives of British Timken have obtained registration; * * * The difficulties in these four countries could be surmounted if you were to take over the business of British Timken * * *. If the matter is handled merely by you beginning when British Timken leaves off you will probably not be able to carry back your title to the trade-mark, and there will be the possibility of trouble with other people. For instance, in Germany we understand that 'Timken' is more or less equivalent to 'tapered' and your rights to your trade-mark may be lost unless you can relate back you [sic] ownership to the date of the Prausnitzer registration."

with British Timken, both to be effective as of January 1, 1924.[33] By these agreements the 1909 agreements[34] were extended to January 1, 1929.[35] These agreements also provided for the first time that the mark "Timken" should "belong exclusively" to appellant.[36] British Timken was to have the right to use the name, but upon termination it was required to take all steps necessary to change its name and cease to have any right in the name or to make use of it in any way; British Timken was further obligated, both before and after expiration of the agreement, to do all acts necessary to secure for appellant the exclusive right in the name in British Timken territory.[37]

During the period from 1909 to 1927, appellant, as well as British Timken and its predecessors,

[33] Fdg., par. 31, R. 965; Def. Exs. 88, 194, R. 1991, 2347.

[34] Def. Exs. 189, 190, R. 2305, 2322, as amended in 1920; Def. Exs. 190, 191, R. 2322, 2338.

[35] Fdg., par. 31, R. 965; Def. Ex. 194, par. 4, R. 2347–8; Def. Ex. 88, par. 3, R. 1992.

[36] Fdg., par. 31, R. 965; Def. Ex. 88, par. 3, R. 1992; Def. Ex. 194, par. 4, R. 2347–8.

[37] Appellant's steps to register the mark in Great Britain had begun in 1920 (Def. Exs. 63–72, 74, 79–80, R. 1947–58, 1959, 1963–4). Appellant soon abandoned, as impossible, the idea of obtaining the registration in its own name (Def. Exs. 77, 79, 80, 83, R. 1961, 1963, 1964, 1966). Instead, it decided to try to obtain the registration through British Timken (Def. Ex. 80, R. 1964). Since it was advised that a direct assignment of the registration to appellant would also require transfer of the good-will of the business of British Timken, appellant decided to insist upon the contract provisions described above relating to

experienced rapid and substantial growth in productive capacity and sales.[38] Each occupied within its own country a dominant position in the tapered roller bearing market, and in 1928 they were strong potential competitors.[39] SMG, the predecessor of French Timken, was then the dominant producer of tapered roller bearings in France and was also a potential competitor (Fdgs., pars. 53, 144, R. 969, 1002–3; R. 111–2, 117).

C. THE PRESENT CONSPIRACY

1. *Formation*

In about 1926, Michael B. U. Dewar, then managing director of Metropolitan Carriage and Wagon Manufacturing Company, the largest Vickers subsidiary (R. 230), became vice-chairman of Wolseley, at a time when Vickers was in financial difficulties (Fdg., par. 37, R. 966; R.

rights in the mark upon termination of the contract (Def. Ex. 80, R. 1964).

A joint application for registration filed by appellant and British Timken in 1925 (Def. Exs. 91, 92, R. 1996, 1997) was withdrawn upon advice of counsel, who believed that it could not succeed (Def. Exs. 98, 99, 104, R. 2003, 2005, 2011; R. 585–6, 594). The British registration was finally obtained by British Timken in 1940, with "the closest cooperation" from appellant (Gov. Ex. 182, R. 1703; see also Gov. Exs. 179, 181–188, 190, R. 1693, 1703–10, 1711).

[38] Fdgs., pars. 34, 35, R. 965–6; R. 56–7, 84–5, 105–7, 144, 241, 435, 455; Def. Exs. 7, 31, 230, R. 1725, 1800, 2545.

[39] Fdgs., pars. 36, 122, 144, R. 966, 996, 1002–3; Gov. Exs. 4, 5, 34, 137, 138, R. 1333, 1385, 1553, 1577; R. 106–7, 453.

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230). During 1926 Dewar made a visit to the United States as a member of a British Government commission studying comparative production costs (R. 232–3), and while in the United States visited appellant's plant (Fdg., par. 37, R. 966; R. 234).

Dewar in 1927 knew that the existing contracts with respect to allocation of territories between appellant and British Timken were, by their terms, to expire on January 1, 1929 (Fdg., par. 37, R. 966; R. 239). On March 10, 1927, upon becoming chairman of British Timken, Dewar wrote to appellant and raised "the question of continuation of our existing agreement" (Fdg., par. 38, R. 966–7; Def. Ex. 4, R. 1722). Dewar suggested making an offer to Vickers for the purchase of British Timken (Fdg., par. 38, R. 966–7; Def. Ex. 4, R. 1722; R. 242). On March 28, 1927, Dewar cabled appellant asking if it would be prepared to extend its agreements with British Timken for 10 years if he were to take over, saying that he did "not think it wise without a 10 years arrangement" with appellant (Fdg., par. 39, R. 967; Def. Ex. 5, R. 1724; R. 247–8). On March 29, 1927, appellant cabled Dewar that it would "give consideration to a ten year term of license" and that "we would be more interested, however, in joining with you in purchasing company from Vickers and making the necessary investment" (Fdg., par. 40, R. 967; Def. Ex. 6, R. 1724; R. 248–9). Dewar replied on

March 30, 1927, that he was "prepared to put up approximately half," and stated that British control was essential (Def. Ex. 7, R. 1725; R. 248–9).

On April 1, 1927, appellant advised its American trade-mark counsel of its proposed purchase of an interest in British Timken, stated that it hoped to arrange for modification of the existing agreements, and requested suggestions as to what should be done regarding name registration (Def. Ex. 102, R. 2010; R. 595–6). Appellant's counsel advised (Fdg., par. 185, R. 1010; Def. Ex. 104, R. 2011):

> We are glad to note that you are endeavoring to obtain controlling interest in British Timken. This is in line with our own suggestion and will put you in *control* of the trade mark "Timken" all over the world, whereas, under existing conditions, there is a danger that, if your present license agreement with British Timken should be terminated, you might not be able to prevent others from establishing a right to use the word "Timken" in certain countries from which you are excluded by the agreement from doing business. [Emphasis supplied.]

Appellant had serious doubts of its rights in the trade-mark "Timken" at that time in the territories assigned to British Timken and French Timken; it realized that it could not use the mark in many of those territories as a result of its own covenants not to compete, and was primarily con-

cerned, therefore, not in safeguarding trade-mark rights which it then possessed, but rather in acquiring rights obtained by others.[40]

In April and May of 1927, negotiations took place in London between an executive of appellant and Dewar, regarding the acquisition of British Timken from Vickers, and renewal of the existing agreements.[41] During these negotiations, Dewar indicated his preference that appellant should join him in the purchase of British Timken on account of its "interest then in the profitable operation of the company" (Def. Ex. 16, R. 1735; R. 264–5). He also insisted upon "a clear understanding of what territories his company would serve."[42] Appellant's representative and Dewar also decided that a jointly owned French company should be organized (R. 288–9)

[40] Fdgs., pars. 182–184, R. 1009–10; Def. Exs. 105, 106, R. 2013, 2015.

[41] Fdg., par. 41, R. 967; Def. Exs. 11, 13, 14, R. 1727, 1728, 1729; R. 251–3, 253–4, 256–7.

[42] Fdg., par. 207, R. 1015–6; R. 933–4. Appellant's Vice-President testified at the trial that "it was only normal" in view of the financial investments, that there should be some understanding as to allocation of territories (R. 933). Appellant's counsel urged at the trial that "Dewar, putting his money into this enterprise, was entitled to that protection" against competition (Orig. R. 2878), and candidly admitted: "It wasn't anything that could be expected in common sense, that Michael Dewar would compete, if he had a company of his own, with British Timken, or for us to compete with British Timken" (Orig. R. 2877).

as well as a jointly owned German company (R. 292–5).

On May 16, 1927, a "Heads of Agreement" was concluded between appellant and Dewar (Fdg., par. 41, R. 967; Def. Ex. 15, R. 1730; R. 257–8). This was a memorandum in general terms of the points agreed upon in the negotiations and was to be "embodied in more formal documents as soon as practicable" (Fdg., par. 41, R. 967; Def. Ex. 15, par. 11, R. 1730, 1734). It provided for the purchase of all outstanding British Timken stock by appellant and Dewar, appellant to contribute £52,500 and Dewar £47,500 (Fdg., par. 42, R. 967; Def. Ex. 15, par. 1, R. 1730), and likewise provided "in connection therewith," as one of the "terms and conditions" of the purchase, for the extension for ten years of the existing restrictive agreements.[43] The district court found that Dewar's underlying motive in making the agreement was his desire to escape appellant's competition and to continue the existing contracts (Fdg., par. 155, R. 1004).

Dewar was to hold a majority of the controlling class of shares and be managing director of British Timken, undertaking "the control and management of the company's affairs", as long as it earned a stipulated minimum net profit

[43] Fdg., par. 43, R. 967–8; Def. Ex. 15, Preamble, par. 10, R. 1730, 1733.

and paid a specified dividend.[44] As one of the terms of the new ten year agreement, all practicable steps were to be taken for protecting the mark "Timken" and "securing the exclusive reversion of the name in all countries to the American Company at the termination of the Agreement" (Fdg., par. 43, R. 967–8; Def. Ex. 15, par. 10 (a), R. 1733). Upon Dewar's death or incapacity for six months, appellant was to "have an option to purchase the shares belonging to him at the date of such death or the expiration of sick period" (Def. Ex. 15, par. 10 (a), R. 1733).

It is apparent from the above facts, as the court held, that the only substantial change in the relationship between appellant and its co-conspirators as a result of the Heads of Agreement was that appellant acquired a stock interest in British Timken and French Timken. The pattern of trade restriction continued. (Fdg., par. 153, R. 1003–4.)

Following the signing of the Heads of Agreement, various steps were taken necessary to carry out its terms. Appellant and Dewar acquired British Timken from Vickers, as agreed (Fdg., par. 44, R. 968; R. 267). Activity began looking

[44] Fdgs., pars. 42, 44, 156, R. 967, 968, 1004; Def. Ex. 15, pars. 2, 69, R. 1730, 1954. Dewar retained control of British Timken throughout the period 1928 to the time of trial (Fdg., par. 156, R. 1004; R. 283; R. 911–15; Def. Ex. 26, R. 1766; Def. Ex. 187, R. 2301; Def. Ex. 228, R. 2483; Def. Ex. 249, R. 2672).

to formal agreements embodying the ten year extension of the existing agreements. In November 1927 appellant's London counsel, in connection with a proposal to formalize the Heads of Agreement as a patent license, stated (Fdg., par. 121, R. 995–6; Gov. Ex. 174, R. 1686):

> As we understand the position, the main advantage derived by the English Company under the Agreement will be the advice and information to be received from you, the right to use the name "Timken" and the *absence of your competition.* Do you not think that it would be better to accentuate these advantages in the Agreement, rather than leave them merely as incidents in a patent license? [Emphasis supplied.]

On January 1, 1928, pursuant to Article 10 of the Heads of Agreement, appellant and British Timken entered into a contract called by them a "Business Agreement" (Fdg., par. 47, R. 968; Def. Ex. 23, R. 1754).[45] This contract extended the restrictive arrangements which had existed between appellant and British Timken for nearly twenty years (Fdg., par. 153, R. 1003–4). The first paragraph provided for the division of territories as follows (Fdg., par. 48, R. 968):

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[45] Appellant's counsel described this as "the contract that carries out pretty much the terms of the heads of agreement that was drawn up in May 1947, between American Timken and Michael Dewar" (R. 36).

> For the purposes of this Agreement the United Kingdom of Great Britain and Northern Ireland and all other countries of Europe and all colonies or dependencies of said United Kingdom and European countries except in or adjacent to North or South America shall be deemed to be the territory of the British Company and the rest of the world shall be deemed to be the territory of the American Company.

Each party agreed not to make or sell, or license to others to make or sell, bearings directly or to others for shipment into the other party's territory, except (a) as an assembled part of completed article of manufacture, manufactured in its own territory, and (b) for bearing replacement purposes in such completed article of manufacture, and then only on payment to the other party of 10% of the net sale price as a penalty (Fdg., par. 51, R. 969; Def. Ex. 23, par. 7, 8, R. 1754, 1757-9).

Appellant granted British Timken an exclusive license to make and sell bearings in its territory under all present or future patents of appellant (Fdg., par. 49, R. 968; Def. Ex. 23, par. 2 (b), R. 1755) while British Timken agreed to assign absolutely to appellant all present and future patent rights in appellant's territory (Fdg., par. 49, R. 968; Def. Ex. 23, par. 2 (c), R. 1755-6). Appellant agreed to advise British Timken as to methods of manufacture which British Timken was obliged to follow insofar as economically

practicable (Fdg., par. 50, R. 968; Def. Ex. 23, par. 4, R. 1756–7). The parties were to inform each other as to all improvements and practices whether or not patented (Fdg., par. 50, R. 968; Def. Ex. 23, par. 2 (a), R. 1755).

British Timken was required to make, sell, and deal in bearings only under the mark "Timken" (Fdg., par. 52, R. 969; Def. Ex. 23, par. 6, R. 1757). The parties agreed to endeavor to maintain the distinctive character of "Timken" (Fdg., par. 52, R. 969; Def. Ex. 23, par. 3, R. 1756). British Timken agreed to join appellant in applications for concurrent registration of the mark "Timken" upon request (Def. Ex. 23, par. 3, R. 1757). Upon termination of the contract British Timken agreed that it would eliminate the name "Timken" from its corporate title and would refrain from using the name "Timken" as a trade-mark and would assign rights therein as directed by defendant (Fdg., par. 52, R. 969; Def. Ex. 23, par. 3 (a), R. 1756). The contract was to extend to January 1, 1938, appellant having the privilege to extend it to January 1, 1948 (Def. Ex. 23, par. 16, R. 1762–3).[46]

Although the 1928 contract (Def. Ex. 23, R. 1754) did not specifically provide for price fixing

[46] By another agreement of January 1, 1928 (Def. Ex. 195, R. 2350) all previous contracts between appellant and British Timken were cancelled, and it was also provided that British Timken's agreement with SMG, the French antifriction bearing manufacturer, should remain in effect until June 30, 1928 (see Fdg., par. 53, R. 969).

on replacement bearings, such price fixing was accomplished by a supplementary understanding. On January 13, 1928, one of appellant's officials wrote (Gov. Ex. 39, R. 1387, 1388) "As you know, we have established service prices for bearings identical with your own and operate at the same discounts * * *," and on March 22, 1928, another official of appellant wrote (Gov. Ex. 42, R. 1390) "As you know we have established service prices identical with your own * * *."

Following the execution of these contracts, and pursuant to Article 10 (b) of the Heads of Agreement (Def. Ex. 15, par. 10 (b), R. 1760; R. 288-9), French Timken was organized (Fdg., par. 54, R. 969). Though stock ownership in the French company was divided equally between appellant and British Timken, Dewar, by contract, supervised and controlled its operations.[47] On June 16, 1928, British Timken and French Timken entered into an agreement (Def. Ex. 29, R. 1789), modeled upon British Timken's agreement with appellant (Def. Ex. 23, R. 1754), allocating to French Timken France and its colonies, dependencies and mandates (except those in North and South America) as its exclusive territory for the manufacture and sale of antifriction bearings (Fdg., par. 55, R. 969). This contract contained provisions relating to

[47] Fdg., par. 54, R. 969; Fdg., par. 156, R. 1004; Def. Ex. 186, R. 2298; R. 912-3, 915-6).

patents, trade marks, and know-how and the division of territories almost identical with those in the contract between appellant and British Timken. French Timken then acquired the mark "Timken" from SMG for 12,000 francs (Fdg., par. 54, R. 969; R. 122–23; Def. Exs. 38 and 39, R. 1851, 1859). French Timken began operations by first importing semifinished products from appellant and British Timken and finishing them in France; within five years it was manufacturing all of the component parts of roller bearings (Fdg., par. 56, R. 969–70; 111–2).

Appellant and British Timken also organized a new company in Germany (Fdg., par. 57, R. 970; R. 117–8). Since they were unable to "wrest" the German trade-mark registration of "Timken" from Prausnitzer (Def. Ex. 89, R. 1993), in order to acquire his existing company and the trade-mark registration for the new company, they gave him a 20 or 25 per cent interest in the new company in addition to a salary as manager (Fdg., par. 57, R. 969–970; R. 117–8; Def. Ex. 44, R. 1907). British Timken then entered into an agreement with the new company similar to the one with French Timken, setting aside Germany as the new company's exclusive territory, and providing for the transfer of the trade-mark to British Timken upon termination (Fdg., par. 57, R. 970; Def. Ex. 47, R. 1935). The German company's business was discontinued in 1934 and the

territory was returned to British Timken (Fdg., par. 57, R. 970; R. 117–8).

2. *The 1935 agreements*

A new contract was entered into between appellant and British Timken, on December 29, 1934, effective January 1, 1935 (Gov. Ex. 20, R. 1347), superseding the 1928 contract (Def. Ex. 23, R. 1766) and to extend to January 1, 1951 (Fdg., par. 58; R. 970). With two modifications,[48] the new contract contained substantially the same provisions as the 1928 contract regarding the division of territories, exclusive exchange of patents and know-how and the trade-mark provisions (Fdg., par. 58; R. 970).

The agreement of 1928 between British Timken and French Timken (Def. Ex. 29, R. 1789), was also superseded by a new contract dated July 15, 1935 (Fdg., par. 63, R. 971; Gov. Ex. 25, R. 1373). It was substantially the same as the 1928 agreement, and likewise provided that replacement sales might be made by appellant, French Timken and British Timken in each other's territories at prices satisfactory to the company in whose terri-

[48] Each company was permitted to sell replacement or service bearings in the other's territory but only at prices approved by the company in whose territory the bearings were to be sold and only upon the payment to the other party of 5% of the net sale price (Fdgs., pars. 59, 60, R. 970; Gov. Ex. 20, pars. 7 and 8, R. 1346, 1349–51), and Russia was to be considered open territory in which both parties could sell at prices and terms mutually agreed upon (Fdgs., pars. 61, 62, R. 970–1; Gov. Ex. 20, par. 10 (c), R. 1352).

tory the bearings were being sold (Fdg., par 63, R. 971; Gov. Ex. 25, pars. 7, 8, R. 1377–9). French Timken was also prohibited from making or selling any product other than bearings marked "Timken" (Fdg., pars. 63, 187, R. 971; Gov. Ex. 25, par. 6, R. 1377).

At this time British Timken had obtained trade-mark registrations in three countries within its allocated territory. Appellant meanwhile had obtained registrations in only 13 of 53 countries allocated to it, 24 of the 66 areas allocated to British Timken and none of the 11 areas allocated to French Timken (Gov. Ex. 28, R. 1383; Def. Ex. 87, R. 1972).

During 1935 appellant and Dewar sold a part of their British Timken stock to the British public, though retaining holdings which, when combined, would assure control (Fdg., par 66, R. 971; R. 911, 913–4).

3. *The current agreements*

The current contracts between appellant, British Timken and French Timken, superseding the 1935 agreements (Gov. Exs. 20, 25, R. 1346, 1373), were entered into in November 1938, and by their terms continue until 1965 (Fdg., par. 64, R. 971; Def. Ex. 27, R. 1771; Def. Ex. 28, R. 1780). The principal contract, dated November 28, 1938, designated a "Business Agreement", and sometimes called the "Tripartite Contract", was among appellant, British Timken and French Timken

(Fdgs., pars. 64, 68, R. 971-2; Def. Ex. 27, R. 1771). The "Tripartite Agreement" recited its purposes as follows (Fdg., par. 187, R. 1010; Def. Ex. 27, R. 1772):

> The Companies parties hereto for their mutual advantage and convenience in working have agreed to make arrangements for an interchange between them of information and facilities and in connection therewith *to define their respective territories* and for other purposes in manner hereinafter appearing. [Emphasis supplied.][49]

The other contract dated November 29, 1938, designated "Supplemental Business Agreement", was among appellant, British Timken and Dewar (Fdg., par. 64, R. 971; Def. Ex. 28, R. 1780).

The current agreements contain substantially the same provisions (Fdgs., pars. 68, 69, R. 972) as the 1935 agreements, in regard to division of world production and marketing areas (Def. Ex. 27, par. 6,[50] R. 1776; Def. Ex. 28, par. 12, R.

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[49] The parties agreed, in part, as follows (Def. Ex. 27, par. 6, R. 1776):

"6. Each of the Companies parties hereto as a covenantor Company hereby covenants with each of the other Companies parties hereto as a covenantee Company that during the life of this Agreement the covenantor Company will not directly or indirectly make or sell or authorise others to make or sell bearings in the territory of the covenantee Company or in the territory of the covenantor Company knowing them to be for shipment into the territory of the covenantee Company. * * *"

[50] The territorial allocation was as follows (Def. Ex. 27, par. 1, R. 1772-3):

1787–8), the fixing of prices on all replacement bearings sold in each other's territories (Def. Ex. 27, par. 6 (b); R. 1777; Def. Ex. 28, par. 12, R. 1787–8); the fixing of prices on bearings sold in Russia, which was joint territory (Def. Ex. 28, par. 12 (b); R. 1788), the exclusive exchange of patents and know-how (Def. Ex. 27, par. 2, R. 1773; Def. Ex. 28, par. 6, R. 1783–4); the prohibition against British Timken and French Timken manufacturing or selling bearings except under the mark "Timken" (Fdg., par. 187, R. 1010; Def. Ex. 28, par. 6, R. 1783–4); and the provision for reversion of the mark "Timken" upon the termination (Def. Ex. 27, par. 3; R. 1774–5; Def. Ex. 28, par. 3, R. 1782).

"The Companies parties hereto agree as follows:

"1. For the purpose of this Agreement—

"(A) The territory of the French Company means the territories of the Republic of France on the Continent of Europe and its Dominions, Colonies, Dependencies, and Mandatory Territories in any part of the world except in or adjacent to North or South America.

"(B) The territory of the British Company means the United Kingdom of Great Britain and Northern Ireland, Eire and all countries other than France on the Continent of Europe and all Dominions, Colonies, Depedencies, and Mandatory Territories of the United Kingdom aforesaid and other European countries except France in any part of the world except in or adjacent to North or South America but does not include any part of the territory of the French Company.

"(C) The territory of the American Company means the rest of the world outside the territories of the French Company and the British Company."

D. THE OPERATION OF THE CONSPIRACY

The division of world production and sales territories, provided for in the series of written agreements among appellant, British Timken and French Timken, was adhered to during the entire period of the conspiracy (Fdgs., pars. 70, 72, 86, 87, R. 972, 973, 983–4).[51] In practice, the parties interpreted the contract prohibitions against "directly or indirectly" selling outside of allocated territory as meaning that they should not only refrain from making such sales themselves, but also should "not permit our customers to ship bearings in this territory" (Fdg., par. 74, R. 974–5; Gov. Ex. 107, R. 1498, 1499).

In preserving the territorial allocations, each party to the conspiracy made it a practice to refuse orders from outside its territory, and to refer the prospective customers to the party in whose territory the bearings were to be used.[52] From July 1, 1945, to February 20, 1947, alone, appellant referred 402 inquiries or orders to

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[51] In 1941 the Australian Government attempted to interest appellant in the construction of a bearing-manufacturing plant in that country, but appellant stated that "under no circumstances" would it do so, explaining: "We have a contract while British Timken Limited which precludes our establishment of a manufacturing plant in Australia. Such a plant would have to be built by British Timken Limited" (Fdgs., pars. 86–87, R. 983–4; Gov. Ex. 120, R. 1529).

[52] Fdgs., pars. 71, 208, R. 973, 1017; Gov. Exs. 139, 141, 141A, 143, 143A, 146, 146A, 147, 147A, R. 1579, 1582, 1583, 1625, 1634, 1635, 1636.

British Timken and French Timken (Fdg., par. 71, R. 973; Gov. Exs. 142, 143–147A, R. 1583, 1625–1636; R. 218–9).

Sales of bearings for replacement purposes outside of allocated territory, though permitted by contract, were discouraged by a penalty or "commission" of 10% (later 5%) imposed upon such sales pursuant to the contracts.[53] Even when replacement bearings were sold subject to the penalty outside of allocated territory,[54] the prices were regularly fixed by agreement among the parties.[55] The price-fixing provisions for the joint territory of Russia (*supra*, p. 41) were also carefully observed (Fdg., par. 94, R. 986).

The "protective discount" was another device used to discourage the "replacement" sales permitted by the written contracts (Fdg., par. 88,

[53] Fdgs., pars. 51, 59, 60, 75, R. 969, 970, 975; Def. Ex. 23, pars. 7 (b), 8 (b), R. 1754, 1758, 1759; Gov. Ex. 20, pars. 7, 8, R. 1346, 1349–51; Def. Ex. 27, par. 6 (b), R. 1771, 1777).

[54] The territorial restrictions were in some instances made even more rigid by supplemental understanding than the contracts provided. For example, although "replacement" sales outside of allocated territory were permitted upon payment of the penalty, British Timken in 1932 agreed not to quote on any inquiry for replacement bearings coming from appellant's territory, but to advise customers to obtain the required products from appellant, unless the customer demanded a British product or unless SKF or a named subsidiary was in competition (Fdg., par. 70, R. 972; Gov. Ex. 82, R. 1470).

[55] Fdgs., pars. 75, 88, 90, 91, 97, 124; R. 975, 985–6, 987, 996; Gov. Exs. 102, 103, 112, 113, 114, 128, 129; R. 1481, 1484, 1511, 1514, 1517, 1541, 1542; R. 187–8.

R. 985). By mutual understanding, each party to the conspiracy, in selling replacement parts for export into the other's territory, charged substantially higher prices than it charged for replacement bearings sold for export to countries within its own territory (*ibid.;* see also Fdgs., pars. 75, 77, 93, R. 977–8, 986; Gov. Ex. 108, R. 1500). Pursuant to this understanding, appellant ordinarily sold at a 70% discount for export in its own territory, but quoted at a "protective discount" of only 50% in response to inquiries from British Timken territory.[56]

The only exception to the adherence to the territorial divisions and the price-fixing provisions of the agreements was in connection with joint efforts by appellant, British Timken and French Timken to eliminate outside competition. Where deviation was necessary to combat the competition of other bearing producers and dealers, it occurred.[57] Appellant was willing to try to pre-

[56] Fdg., par. 88, R. 985; Gov. Exs. 108, 124, 128, 131, 132, 133, R. 1500, 1532, 1541, 1545, 1546, 1549; R. 895–6.

[57] Fdgs., pars. 92, 97, 98, 124, R. 986, 987–8, 996. One such exception was the practice whereby the three companies, in order to assure the sale of "Timken" bearings manufactured by one of them, each filled orders for replacement bearings in the other's territory (upon payment of the required penalty), in instances when one of the others was not in a position to fill all such orders from within its territory (Fdg., par. 99, R. 988; R. 104–5, 177). This practice was followed notwithstanding British Timken's agreement as a general practice not to quote on any inquiry for replacement bearings coming from appellant's territory (Fdg., par. 70, R. 972; Gov. Ex. 82, R. 1417). Its purpose was, of course, to preserve

vent the growth of outside competition "by any means we could, including selling bearings at a loss if necessary" (Fdg., par. 102, R. 988–9; R. 935–6). At times appellant, British Timken and French Timken joined to fight outside competition by selling to each other at prices which, although not below cost, were considerably below the usual charge made to other customers.[58] In combatting outside competition, the "protective discount" policy was sometimes relaxed in situations where buyers were becoming "familiar with the fact that we are protecting British Timken" (Fdgs., pars. 92, 93, R. 986; Gov. Ex. 131, R. 1545).

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the value of the common mark as a competitive weapon to be used jointly against outsiders. "The whole object of that arrangement * * * was in order to combat competition; that was the whole basis of it" (Fdg., par. 100, R. 988; R. 173).

[58] Fdgs., pars. 73, 103, R. 973–4, 989–90; Gov. Exs. 44, 75, 76, R. 1392, 1458, 1459. For example, in 1929 appellant declined an order from the Ford Motor Company for bearings for its Cork, Ireland, plant, located within British Timken territory, and instead made the bearings, sold them to British Timken for resale to Ford at prices "very materially below the prices that we sell Ford"; appellant explained that "our joint efforts must be made to keep competition out of this Ford situation" (Fdg., par. 73, R. 973–4; Gov. Ex. 44, R. 1392). Later in the same year, appellant suggested that, because of the lower Canadian tariff on English products, it could combat SKF competition in Canada more readily if British Timken would sell its bearings to appellant at low prices for resale by appellant in Canada (Fdg., par. 103, R. 989–90; Gov. Ex. 75, R. 1458). Dewar replied: "I should love to help you compete with SKF in Canada" (Fdg., par. 103, R. 989–90; Gov. Ex. 76, R. 1459).

During World War II, in order to prevent business from going to competing outside manufacturers, the parties, though at first attempting to retain the territorial restrictions inviolate,[59] made special arrangements for appellant to supply customers in British Timken markets for the period of the war (Fdgs., pars. 72, 77–9, R. 973, 977–9). Appellant, however, made sales to such customers at prices fixed by British Timken, through British Timken distributors only, and credited British Timken with part of the profit.[60] In Australia (which was British Timken territory, *supra*, p. 40, n. 49), a critical situation developed in 1940 because of the requirement that the British Timken distributor there should route all orders through British Timken rather than send the orders direct to appellant, even though under the arrangement they were to be filled by appellant (Fdg., par. 78, R. 978). This arrangement caused such delays in the filling of orders that the British Purchasing Commission became concerned over the effect upon the Australian war effort, and appellant became concerned over the bearing business going to outside manufacturers

[59] Fdgs., pars. 74–6, 208, R. 974–6, 1017; Gov. Exs. 107, 109, 123, R. 1498, 1502, 1531.

[60] Fdgs., pars. 77–8, R. 977–8. All sales made outside of allocated territory, under permitted exceptions to the territorial allocations, were handled only through the party to whom the territory was allotted (R. 115, 155, 170–1, 205). For example, appellant never made any sales in French Timken territory except through French Timken (R. 155).

(Fdgs., pars. 79–84, R. 979–81). British Timken finally agreed to permit Australian orders for "Timken" bearings to go directly to appellant (Fdg., par. 85, R. 983; Gov. Ex. 115, R. 1524).

Another means of opposing the competition of other producers of bearings was the exclusive exchange of know-how and inventions, patented and unpatented, among appellant and the co-conspirators.[61] In addition, appellant made it a policy not to sell alloy steel tubing, of which it was and is an important producer (R. 45–6, 72, 73–4, 458), to outside competitors in British Timken territory, for use in making bearings. When Dewar raised a question as to such sales, he was assured by appellant that "under no circumstances would we sell our tubing to anyone in the world who might as a result harm British Timken, French Timken or American Timken".[62]

In cooperating to eliminate competition among themselves and from others, appellant, British Timken and French Timken augmented the previously described agreements and understandings by cartel agreements between British Timken and French Timken and certain of their competitors abroad.[63] These agreements provided for the

[61] Fdgs., pars. 95, 97, 124, 137, R. 986–7, 996, 1000; Gov. Exs. 79, 81, 97, R. 1465, 1467, 1475.

[62] Fdgs., pars. 104, 105, R. 990; Gov. Exs. 85, 86, R. 174, 1473.

[63] Fdg., par. 106, R. 991. Although appellant was not actually a party to any of those cartel agreements, it cooperated and consulted with British Timken and French

sharing of customers and sales on a quota basis, and the stabilization of prices, in England, France and Italy.[64] The English cartel, for example, began in 1932 with a 70%–30% division of the Ford English business between British Timken and SKF (Fdg., par. 112, R. 993; Gov. Exs. 61, 63, R. 1411, 1416), and was then expanded to a general arrangement apportioning all business between British Timken and SKF (R. 141). The cartel agreements were successful in stabilizing and also raising bearing prices in England and France.[65]

The restrictive use of the trade-mark "Timken," in accordance with the contractual provisions requiring British Timken and French Timken to manufacture and sell bearings only under that name (*supra*, p. 41), has continued not only through the entire period of the present conspiracy, but also throughout the period leading up to its formation.[66] These restrictions aided the division of territories (Fdgs., pars. 124, 137,

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Timken in bringing them about, and approved the agreements before they were executed, all as a part of the plan of eliminating outside competition (Fdgs., pars. 110, 111, 125, R. 992, 996; Gov. Exs. 49–65, 65A, 68, 70, R. 1396–[redacted] 1444, 1438, 1445, 1453; R. 543–4).

[64] Fdgs., pars. 106, 111–115, R. 991, 992–4; Gov. Exs. 49, 51, 54, 59, 61, 73, R. 1396, 1397, 1400, 1411, 1455; R. 140, 141, 149–50, 151–2, 154, 207–8.

[65] Fdgs., pars. 111, 112, R. 992–3; Gov. Exs. 60, 63, R. 1409–16.

[66] Fdgs., pars. 96, 124, 137, 187, R. 987, 996, 1000, 1010; Gov. Exs. 3, 49A, 49B (not printed), R. 108, 113–4, 403.

R. 996, 1000), since, as a result of its own covenants not to make or sell bearings in territory allocated to others (Fdg., par. 183, R. 1009–10), in many parts of the world appellant could not use the mark in competition with British Timken or French Timken (Fdg., par. 182, R. 1009).[67] The restrictions also included use of the mark by appellant and its coconspirators as a help in excluding the competition of outsiders.[68] Appellant's primary interest was in preserving the value of the common mark as a means of eliminating competition of outsiders throughout the world (Fdgs., pars. 84, 101, R. 981–3, 988; Gov. Ex. 113, R. 1514).

[67] Appellant also took steps to prevent British Timken and French Timken from importing "Timken" bearings into its allotted territory, by recording its United States registration with the Bureau of Customs, so that the Bureau would detain any importation of bearings carrying the recorded mark (*infra*, pp. 76–77).

[68] Fdgs., pars. 84, 124, 137, R. 981–3, 996, 1000; Gov. Exs. 43, 113, R. 1390, 1514. For example, in connection with an attempt in 1928 to prevent Timken-Detroit Axle Company from selling appellant's bearings for replacement purposes in Europe at prices lower than those agreed upon with British Timken, one of appellant's officials wrote Dewar: "Naturally, once the trade-mark of Timken is registered in England, this situation can be entirely cleared up" (Gov. Ex. 43, R. 1390). Again, in 1940, appellant advised British Timken that the way to combat competition from other manufacturers for replacement or service sales in Australia was "for British Timken to instruct all of their foreign service connections to very definitely and positively specify Timken tapered roller bearings" (Fdg., par. 84, R. 981–3; Gov. Ex. 113, R. 1515).

E. APPELLANT'S ACTIVITIES DURING AND SINCE TRIAL OF THIS CASE

On the day the trial began, March 22, 1948, appellant entered into two new agreements. One agreement, with British Timken, provided for maintenance of the control arrangements in British Timken (Gov. (Decree) Ex. 2, R. 2677–80; R. 1144). The other agreement, with Dewar, gave appellant an option to purchase Dewar's shares in British Timken upon the occurrence of any of several named contingencies, including his death, incapacity, or decision to sell (Gov. (Decree) Ex. 3, pars. 1 (a) and (b), R. 2680–1). It also gave Dewar an option to purchase shares in the event that appellant should wish to sell them (Gov. (Decree) Ex. 3, par. 1 (c), R. 2681).

In addition, the agreement made Dewar's approval a condition to any sale by appellant of its shares (Gov. (Decree) Ex. 3, par. 2, R. 2682). This absolute right to approve or disapprove a purchaser of appellant's British Timken stock was preceded by an "honorable understanding" contained in Sec. 1 of the agreement of September 7, 1935 (Gov. (Decree) Ex. 4, R. 2683–86), that Dewar (a) would not "unreasonably" stand in the way of appellant selling its stock, and would object to a purchaser only "on reasonable grounds," and (b) would take all steps within his power to bring about a registration on the

company's books of appellant's shares to the purchaser. The 1948 agreements thus differed from the earlier agreements in that the appellant for the first time gave Dewar a legally binding veto power over the transfer of its stock holdings, a power which could be exercised without assigning reasonable or any other grounds.

Appellee urged that these agreements not only were a continuation of the illegal conspiracy, but also would interfere with an order of divestiture, and the district court cancelled the agreements in Section IV B of the final judgment (*supra*, p. 13; R. 1175).

Appellant states in its brief that Michael Dewar died on December 21, 1950, while this appeal was pending. Dewar held approximately 24 per cent of the outstanding ordinary shares of British Timken (Fdg., par. 66, R. 971), and 50 per cent of the outstanding stock of French Timken (Fdgs., pars. 54, 66, R. 969, 971). Appellant also states that it has acquired from Dewar's estate, presumably in February 1951, all of his ordinary shares of British Timken, pursuant to the option described above. It further states that it has acquired stock of French Timken representing one vote at stockholders' meetings, pursuant to another option exercisable at Dewar's death, and that it proposes to purchase the remainder of French Timken stock pursuant to a right of first refusal (Def. Ex. 228, R. 2539–41). This option of first refusal on the remainder of French Tim-

ken shares was not exercisable upon the contingency of Dewar's death, but rather upon the decision of Dewar's holding company to sell, which decision might have been made either during Dewar's lifetime or after his death (Def. Ex. 228, R. 2541).

On October 12, 1949, immediately following the hearing on relief held in the district court, appellant's representatives participated in a conference in London at which arrangements were made for further use of the trade-mark "Timken" by appellant and the co-conspirators on the basis of the existing allocation of territories. One of the purposes of the arrangements was stated to be "that each of the three companies would have the use of the mark contemplated by the 1938 contract" (Def. (Decree) Ex. D, R. 2758). As part of the arrangements, appellant was to become a "registered user" of the name "Timken" in Great Britain and other countries within British Timken territory, British Timken being the "registered owner." (Def. (Decree) Ex. D, R. 2757–62).

Under the British Trade Marks Act, 1938, which "does not legalize the general licensing of trademarks," a registered user may sell products under the registered trade-mark only if control is maintained by the registered owner over the "permitted use" (Gov. (Decree) Ex. 8, R. 2743, 2745, 2750–1). Thus as a "registered user" appellant could manufacture bearings for sale in Great

Britain under the mark "Timken" only "in accordance either with prescribed specifications or standards of quality laid down or directions given" by British Timken, which must be given the right "to inspect the goods and the methods of manufacturing on the premises of the user or to have samples submitted" (Gov. (Decree) Ex. 8, R. 2750). Appellant's rights as "registered user" were to be further confined within the territorial allocation of the 1938 contracts (Def. (Decree) Ex. D, par. (M), R. 2762).

SUMMARY OF ARGUMENT

I

A. The world-wide allocation of manufacturing and sales territories for anti-friction bearings by appellant, British Timken and French Timken was *per se* unreasonable and unlawful under Sections 1 and 3 of the Sherman Act. *United States* v. *National Lead Company,* 63 F. Supp. 513, affirmed, 332 U. S. 319.

B. The sale of bearings by appellant, British Timken and French Timken in each other's territories, under certain limited exceptions to the territorial allocations, only at prices agreeable to the party into whose territory the sales were made, was *per se* unreasonable and unlawful under the Sherman Act. *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 218.

C. The combined activities of appellant, British Timken and French Timken to reduce the compe-

tition of outsiders, whereby they protected each other's markets, relaxed the territorial division and permitted sales in each other's territory to the extent necessary to prevent sales by a competitor, and sold bearings to each other at preferential prices in order to combat outside competition, were illegal under the Sherman Act. *Associated Press* v. *United States*, 326 U. S. 1, 15.

D. The exclusive exchange of know-how and inventions, patented and unpatented, among appellant, British Timken and French Timken permitted members of the combination to utilize the extensive research and technical knowledge of the group while preventing its access to outsiders. This exclusive exchange buttressed the other illegal conduct, and was an integral part of the conspiracy to suppress trade. As such, it was unlawful under the Sherman Act. *Associated Press* v. *United States*, 326 U. S. 1, 15; *Fashion Originators Guild* v. *Federal Trade Commission*, 114 F. 2d 80 (C. A. 2), affirmed, 312 U. S. 457, 465.

E. The restriction in the division of territories contracts between appellant, British Timken and French Timken, prohibiting the co-conspirators from manufacturing, selling, or dealing in bearings except under the mark "Timken", provided a ready means of policing the division of territories. Appellant was able not merely to prevent British Timken and French Timken from manufacturing or selling their products in appellant's

territory by trade-mark infringement suits, but also to utilize the customs laws for detaining importations of bearings carrying the infringement mark. The restriction also prevented British Timken and French Timken from building up good will in a different mark and thus creating competition for appellant from products labeled under such different mark. Coupled with the contract provision requiring British Timken and French Timken to cease using the mark "Timken" upon termination of the contract, the restriction also assured continuation of the territorial allocation, since those companies could terminate only by accepting virtual destruction of their present business and good will. Even a patent licensor may not limit its licensee to exploitation of patented products. The prohibition against dealing in other marks foreclosed appellant's American competitors from selling bearings to British Timkin and French Timken, which have supplemented their production by purchasing from appellant. Finally, common exploitation of the mark "Timken" through worldwide advertising and promotion gave each member of the combination an advantage as against outside competitors in securing replacement business for original installations made by all three of them.

F. British Timken and French Timken's participation in foreign cartel arrangements to fix prices, allocate customers and divide sales in

England, France and Italy, restricted exports by United States bearing producers and were part of the over-all conspiracy to eliminate competition between the parties and with outsiders, and therefore violated the Sherman Act. *United States* v. *National Lead Company,* 63 F. Supp. 513, 524, affirmed, 332 U. S. 319; *United States* v. *Nord Deutscher Lloyd,* 223 U. S. 512.

II

A. Even if restraint of trade were not appellant's primary purpose, the restraints which it imposed could not be justified, as they were unreasonable *per se.* Such restraints as division of territories and price fixing, because of their inherent character, have been recognized by this Court as necessarily having an undue and unreasonable effect upon competition. Such restraints can under no circumstances be justified by business convenience or necessity, nor by resort to formal business devices. Hence, the fact that division of territories and price fixing might have been expedient for appellant in its business arrangements with Dewar or British Timken and French Timken, or that the arrangements were called a "joint venture" or a "trade-mark license" could not excuse these basic violations of the Sherman Act.

B. The so-called "joint venture," to which appellant claims the restraints were ancillary, did not in fact ever exist. Appellant and Dewar were

not jointly liable for the obligations of British Timken, as they would have been had that business entity been a "joint venture" instead of a corporation. Nor did either have authority to act for the common enterprise, which as a corporation could act only through its duly authorized officers. Other essentials of a "joint venture," such as common control and sharing of profits and losses, were also lacking. And at no time were the restraints of trade ancillary or incidental to the "joint venture." They were the purpose and essence of it.

Appellant's purchase of stock in British Timken and French Timken was in fact only a transaction whereby it acquired substantial interests in potentially competing corporations. The relationship of stockholder and corporation thereby created, even had the stock interests been controlling, could not support an agreement between the affiliated companies not to compete. *Kiefer-Stewart Company* v. *Seagram & Sons,* 340 U. S. 211, 227; *United States* v. *Yellow Cab Co.,* 332 U. S. 218.

C.1. Because of the inherent nature of a trade-mark, its owner may not license another to use it and, as an incident thereto, impose restraints upon competition between them. A trade-mark is merely a method of identifying the source of origin of goods. It enables a seller to distinguish his products from those of others. A trade-mark does not give exclusive rights to manufacture, use

or sell a product within the territory of the nation recognizing the right. The owner of a trade-mark may not make a negative and merely prohibitive use of it as a monopoly. *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 97–8. It does not even give exclusive rights to use of a word or symbol, but only a right to prohibit its use by others so as to confuse purchasers as to source of origin. *Champion Spark Plug Company* v. *Sanders*, 331 U. S. 125, 130.

Trade-mark rights are entirely unlike patent rights, since they are not the product of invention, do not give the public the benefit of disclosure of an invention, and do not carry out any constitutional intent to promote the progress of science and useful arts. Further, trade-mark rights, unlike patent rights, are unlimited in time, and restraints of trade if allowed in connection therewith could be made perpetual. Because of its inherent nature, a trade-mark may be "licensed" only under exceptional circumstances where deception of the public will not result, and in no event may restraints of trade be imposed as an incident to the granting of permission to others to use the mark.

Even if a trade-mark had the status of a patent, it would not support the restraints imposed by appellant. Appellant did not have trade-mark rights in many countries where the territorial restraints applied, and even a patentee may not impose restraints beyond the scope of its patent

rights. Further, appellant required British Timken and French Timken to manufacture bearings only under the name "Timken." Even a patentee may not require his licensee to manufacture only under the patent.

The public interest requires that trade-mark rights be kept within their proper bounds, and not be used as a device for allocating world markets, fixing prices, and otherwise nullifying the policy of the Sherman Act against restrictions on competition.

2. Appellant did not own and hence could not "license" the trade-mark "Timken" in many areas of the world. It had no trade-mark rights in most of the areas allotted to British Timken and French Timken as a result of its covenant not to compete in those areas. It had first permitted others to obtain rights in the mark in connection with the territorial allocation, rather than attempting to use its mark competitively. It did not guard, as a competing seller would, the symbols used to prevent simulation of its goods by actual or potential competitors. Later, it directed its activities, not to protecting its own rights in the mark "Timken," but rather to acquiring rights in that mark which it had permitted others to obtain, without actually entering into competition in contravention of its agreements not to compete.

Appellant admits that it has no common law

rights arising from the use of the mark "Timken" in areas of the world allotted to British Timken and French Timken. Nor is it the registered owner in most of such areas. Appellant claims rather to be the "equitable owner" in those countries, principally on the basis of the provision, in the division of territories contracts, for the reversion of the mark in those areas from British Timken and French Timken to appellant at the expiration of the agreements.

This provision for reversion of the trade-mark, however, was itself a restriction which violated the Sherman Act because it aided the division of territories and suppression of outside competition. Even assuming this provision to be legal under English law, and to give appellant "equitable ownership" in the mark in England, it does not excuse appellant's violation of the Sherman Act. Appellant cannot justify such illegal restraints of trade as division of territories by resort to another provision of the same contract which itself was an illegal restriction under the Sherman Act.

3. Finally, even if appellant had trade-mark rights capable of licensing, and even if the restraints here imposed could have been reasonably ancillary to such licensing, the district court unequivocally found that in fact the restraints were not ancillary but were appellant's primary purpose.

III

The findings are fully adequate and are supported by the evidence. This Court will not undertake to reweigh the evidence, especially as to imponderables such as intent, where a trial court has conscientiously and thoroughly reviewed the entire evidence and made adequate findings. *United States* v. *Yellow Cab Co.,* 338 U. S. 338.

IV

A. Appellant's 30.25 percent stock interest in British Timken and 50 percent interest in French Timken held at the time of judgment were principally acquired in 1927, as an integral part of the illegal agreements which continued the allocation of world trade territories between appellant and British Timken, and made French Timken a party to this and the various other illegal restraints on competition. The existing restrictive agreements were to expire on January 1, 1929, and these stock interests, acquired as an integral part of the conspiracy, were a factor inducing their extension. The "Heads of Agreement" of May 16, 1927, provided for the purchase of stock in British Timken and French Timken by appellant and Dewar, and in connection therewith for the extension of the existing restraints. Since that time, appellant's interests in these companies consistently have been utilized to further the illegal conspiracy. Though not giving appellant

control, they have enabled it to influence the maintenance of restrictions on competition between itself and the companies in which it invested. It used this influence in favor of continuing the illegal restrictions when the basic agreements were renewed in 1934, 1935, and 1938. In addition, the interests served initially and have continued to serve as an inducement for appellant, British Timken and French Timken not to compete with each other. They will continue to serve as a constant deterrent to competition as long as they are allowed to exist.

Because these interests were illegally acquired as an integral part of the conspiracy, were illegally used in furtherance thereof, and have served and will continue to serve as an inducement for appellant and those companies not to compete, the divestiture ordered by the district court was essential to remove effectively existing and prospective barriers to competition.

B. The injunctive provisions of the district court's judgment to which appellant objects were properly designed to terminate the unlawful restraints of trade and to prevent their recurrence. Though consisting primarily of prohibitions against continuation of activities which formed a part of the illegal conspiracy, to the extent that they went beyond the narrow limits of the proven violation, they were necessary in order to provide effective relief. *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 90.

The injunctions against exclusive exchange of know-how, patents, material and machinery are justified, since evidence of such exchange was offered at the trial, and the lower court specifically found that the exchange was most helpful in buttressing the other illegal conduct, and was an integral part of the general scheme to suppress trade. The failure of the complaint to make such a charge was not a fatal defect. Federal Rules of Civil Procedure, Rules 15 (b), 54 (c).

The injunctions against appellant's agreeing with British Timken, French Timken, or their subsidiaries, agents, sales representatives, or distributors to fix prices for the sale or resale of bearings in the United States are properly calculated to sever the unlawful ties between appellant and its co-conspirators. The injunctions are directed to horizontal agreements between these companies to fix prices. They do not affect any right appellant may have to maintain resale prices under the Miller-Tydings amendment, unless the exceptional circumstance should arise that appellant, British Timken, and French Timken had the same United States distributor.

The injunctions against appellant's refusing to sell bearings for the reason that they are for resale or distribution in the territories allotted by the conspiracy to British Timken and French Timken are justified by appellant's long-standing policy and practice of not selling bearings in

those countries pursuant to the illegal agreements. A mere injunction prohibiting the appellant from conspiring to divide territories is not sufficient to restore competition in the industry. The injunction against refusing service and assistance to customers located in British Timken and French Timken territory is necessary because the evidence showed that such service and assistance is essential to the sale of bearings. The authority of the district court to deprive appellant of its right to choose its customers was settled by this Court's decision in *International Salt Company v. United States,* 332 U. S. 392.

Injunctions against appellant's entering into agreements with British Timken and French Timken for the transfer of trade-mark rights upon restrictive conditions, such as allocation of territories and exclusive exchange of know-how and materials, are justified by the district court's finding that the restrictive use of the trade-mark "Timken" was an integral part of the conspiracy. Appellant's continuing intention to use the mark in conformity with the illegal territorial allocation is demonstrated by its action immediately following the hearing on relief in the district court, when it agreed with British Timken to transfer and allocate rights in the mark pursuant to the territorial division in the 1938 contracts.

ARGUMENT

INTRODUCTION

The underlying legal issues in this case have a simplicity which may be somewhat obscured by the number and intricacy of the agreements which have been entered into in furtherance of the conspiracy, and the prolixity of the points urged by appellant. The two basic questions here are whether the Sherman Act has been violated and if so, whether the relief ordered by the district court is appropriate.

With respect to the question of violation of the Act, it has been abundantly established that appellant for many years has engaged in concerted activities with British Timken and French Timken to allocate world markets, fix prices and restrict the competition of others in the sale of anti-friction bearings. The principal issues raised by appellant are whether the restraints imposed by the parties to the conspiracy can be said to be "ancillary" to some lawful activity, and if so, whether they are reasonable. Appellant contends that the restraints were ancillary to a "joint venture" between appellant and Dewar, or ancillary to the licensing of the trade-mark "Timken". We shall show that the restraints there imposed were unreasonable *per se*, and therefore could not be justified even if ancillary; and that in any event they were not in fact ancillary in purpose, either to a joint venture or to

trade-mark licensing. On the contrary, the creation of stock relationships among the parties and the agreements with respect to the use of the name "Timken" were steps in furtherance of the conspiracy to restrain trade.

The district court has ordered divestiture of the interests of appellant in British Timken and French Timken, and injunctive relief designed to make certain that the potential competitors will be freed of any ties with each other which might prohibit competition among them. We shall show that the decree fashioned by the district court is entirely appropriate to dispel, as far as possible, the effects of this long-standing conspiracy, and to prevent its recurrence in any other form.

I

THE DISTRICT COURT'S FINDINGS ESTABLISH THAT THE AGREEMENTS AND OTHER CONCERTED ACTIVITIES OF APPELLANT, BRITISH TIMKEN AND FRENCH TIMKEN HAVE UNLAWFULLY RESTRAINED FOREIGN COMMERCE

The offense found by the district court involves a world-wide combination and conspiracy between appellant and its co-conspirators to eliminate competition among themselves and with others in the manufacture and sale of antifriction bearings. The suppression of competition by the members of this international cartel is, and has been, accomplished by numerous means and methods.

Some of these means, lawful in themselves, are unlawful as part of the illegal scheme and purpose to eliminate competition. Other means are unreasonable restraints of trade in themselves or are illegal *per se,* such as allocation of territories, price fixing, combination to eliminate the competition of outsiders, and cartel arrangements with foreign producers abroad. Similarly, the basic written contracts between appellant and its co-conspirators are in themselves illegal *per se.*

A. *Division of world production and sales territories*

The division or allocation of exclusive territories is the crux of this case. Territorial allocations have existed ever since the beginning of relations between the parties in 1909. They presently exist in the form of current contracts between appellant, British Timken and French Timken which by their terms continue in effect until 1965 (*supra,* p. 39).

Each of the parties is prohibited from manufacturing or selling bearings, or authorizing others to make or sell bearings, in the territories allocated to the other parties. Thus appellant may not export, or permit other American firms to export, its bearings from the United States for sale in Europe and the French and British Empires. Neither may appellant manufacture bearings in Europe or in the French or British Empires and

import such bearings into the United States. (*Supra*, pp. 39–40.)

Conversely, British Timken and French Timken may not import bearings into the United States. This inflexible territorial allocation has been strictly adhered to throughout the period of the conspiracy, and the district court so found (Fdg., par. 70, R. 972).

It is now settled, and the district court correctly held (Concl., par. 128, R. 997), that the division of territories among competitors in different countries of the world and the elimination of competition between them violates the Sherman Act. *United States* v. *National Lead Co.,* 63 F. Supp. 513, affirmed, 332 U. S. 319; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 182. As the district court pointed out, contracts providing that in a particular area products may be sold by only one of the members of a combination "necessarily were intended to and had the effect of eliminating competition" (Concl., par. 129, R. 997).

The inherent danger of such agreements has been recognized by this Court in consistently holding that combinations or conspiracies for allocating or dividing markets are illegal *per se. United States* v. *American Tobacco Co., supra; United States* v. *National Lead Co., supra; United States* v. *Addyston Pipe & Steel Co.,* 175 U. S. 211, 241; *United States* v. *Aluminum Co. of America,* 148

F. 2d 416, 439–45, 447–8 (C. A. 2); *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 497.

B. *Price fixing*

To the limited extent that exceptions have been made to the territorial division, appellant and the co-conspirators have sold in each other's territory only at prices agreeable to the party into whose territory the sales were made. Current contracts provide for agreed prices on replacement sales in each other's territory and a mutual understanding has existed as to the actual prices (the "protective discount") to be charged. Appellant also has fixed the resale price of others buying its bearings in the United States for resale in the territory allocated to the co-conspirators. Prices also have been agreed upon between appellant and British Timken on sales in Russia, which is joint territory. (*Supra,* p. 41.)

The district court was correct in holding (Concl., par. 132, R. 998) that the practice of selling only at prices agreeable to the party into whose territory bearings are sold, the provisions of the contracts for agreed prices on replacement bearings, and the other price fixing arrangements between the parties, constitute violations of the Sherman Act. In an unbroken line of decisions, of which *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211, is the latest, this Court has held to be illegal *per se* all agreements and combinations

to fix or control prices or restrain price competition.[69]

C. *Elimination of outside competition*

The elimination of competition between appellant, British Timken and French Timken through the division of world markets, price fixing and other means, was but one aspect of the conspiracy. As in most cartels there was also the intent and purpose to eliminate the competition of other anti-friction bearing producers (Fdg., par. 98, R. 987–8). That purpose has been achieved by complete and full cooperation between appellant and its co-conspirators. In some instances they have acted collectively to drive outsiders from the market; in other cases they have joined with outsiders to eliminate competition through arrangements to fix prices and allocate sales and customers. (*Supra*, pp. 47–48.)

The parties in acting collectively against outsiders have made exceptions to the territorial division in order to combat the competition of such outsiders and to protect each other's markets. They have tolerated sales in each other's

[69] *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427; *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150; *United States* v. *Masonite Corp.*, 316 U. S. 265, 276; *United States* v. *Line Material Co.*, 333 U. S. 287; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131; *United States* v. *National Ass'n of Real Estate Boards*, 339 U. S. 485.

territory to the extent necessary to prevent that market from going to a competitor. Competitors likewise have been excluded from markets by reason of appellant's intermittent relaxation of its "protective discount" policy. (*Supra,* p. 45.)

Activities against outsiders also have taken the form of sales by the parties to each other at levels below the usual charge made to other customers.[70] In that connection the district court found that the intent and purpose of the parties was to "supplement the plan of strict compliance with the allocated areas and to protect themselves from competition by outsiders" (Fdg., par. 103, R. 989). This practice of sales to each other on a "most favorable basis" has made it virtually impossible for independent producers to compete. (*Supra,* p. 45.)

Furthermore, appellant has exercised the policy of refusing to sell its special bearing steel to competitors who might harm British Timken, the district court finding that the parties made

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[70] This is a favored practice of international cartels. See Stocking & Watkins, *Cartels or Competition?* (1948), p. 142:

"Furthermore, price discrimination often arises out of business dealings among cartel members themselves. The offer of special low prices to affiliated concerns is an effective way of promoting trade solidarity. Discrimination is also used to prevent competition from allied or closely related industries.

"All of these cartel practices are, of course, far from consistent with the principles of a 'fair field and no favors' and of 'equal opportunity for all,' which are the bedrock of a private enterprise economic system."

certain that steel was not made available for use by their competitors. The exercise of such policy has had the direct result of placing outside competitors at a competitive disadvantage, thus reducing their ability to survive. (*Supra*, p. 47.)

All of the collective activities herein described—protection of each other's markets; sales of bearings at preferential prices; preferential treatment respecting bearing steel; and use of combined technological resources—were carried out, the district court found, with the intent and purpose of excluding "individual" or outside competitors from the anti-friction bearing market. The court properly concluded as a matter of law that such association of appellant, British Timken and French Timken for the purpose of protecting each other's markets and the exclusion of outsiders was illegal under the Sherman Act (Concl., par. 134, R. 999). This Court, in a uniform series of decisions, has struck down any such collusive action by groups of competitors.

In *Associated Press* v. *United States*, 326 U. S. 1, 15, the vice of such an arrangement was described as follows:

> The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. Victory of a member of such a combination over its business rivals achieved by such

collective means cannot consistently with with the Sherman Act or with practical, everyday knowledge be attributed to *individual* "enterprise and sagacity"; such hampering of business rivals can only be attributed to that which really makes it possible—the collective power of an unlawful combination.[n]

D. *Exclusive exchange of know-how*

Another significant means of eliminating the competition of outsiders has been the exclusive exchange of know-how and inventions, patented and unpatented, among appellant and its co-conspirators. Current agreements provide for a complete and continuous interchange (until 1965) of all technological information relating to the manufacture of anti-friction bearings. (*Supra*, p. 41.)

The district court found that the exclusive exchange of know-how was carried on for the purpose of eliminating the competition of third parties (Fdg., par. 124, R. 996). It therefore held that, while it did not appear that such arrangement alone served as a direct instrument to eliminate competition, it was used by the parties as a "most helpful" aid in buttressing other illegal conduct, and was illegal as an integral part

[n] See also *Montague & Co.* v. *Lowry*, 193 U. S. 38, 45; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 47–48; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 406–7.

of the general conspiracy to suppress competition. (Concl., par. 137, R. 1000.)

The exclusive exchange of know-how has effectively eliminated the competition of third parties since it has permitted the members of this combination to utilize the extensive research and technical knowledge of the group while preventing access to outsiders.[72] The result has been that newcomers and outsiders, while denied access to virtually all the existing technology in the industry, are forced to compete for business against the combined technology and power of the three industrial organizations which control and dominate the world markets for tapered roller bearings. It is, of course, no aid to such potential competitors that tapered roller bearings are competitive with other kinds of bearings (Appellant's Br. 44 ff.).

The illegality inherent in such activities springs from the collective power of a combination as opposed to the individual. The elimination of competition as the result of combination is precisely what the Sherman Act condemns. *Associated Press* v. *United States,* 326 U. S. 1, 15;

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[72] It has been held that pooling of patents by competitors for the purpose and effect of eliminating competition is illegal since it enables *each* member of the combination to use the combined patent power of *all* members against their respective competitors, *Standard Oil Co.* v. *United States*, 283 U. S. 163, 174; *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 562 (D. Mass.); *United States* v. *Vehicular Parking*, 54 F. Supp. 828, 839 (D. Del.).

Fashion Originators Guild v. *Federal Trade Commission,* 114 F. 2d 80, 85 (C. A. 2), affirmed, 312 U. S. 457, 465.

E. *Restrictive use of the trade-mark "Timken"*

Just as with know-how, the district court concluded that the restrictive use of the mark "Timken" has been "most helpful" to the conspirators in serving to buttress other illegal acts and was unlawful as an integral part of the general conspiracy to suppress competition (Concl., par. 137, R. 1000).[73]

The mark "Timken" is the only mark that appellant, British Timken and French Timken use on their tapered roller bearings.[74] Indeed, the current contracts prohibit the co-conspirators from manufacturing, selling or dealing in bearings except under that mark. This contract provision is the very heart of appellant's restrictive use of the mark. Most importantly, it provides an easy, almost self-enforcing means of policing the division of territories. To the extent that appellant has exclusive rights in the mark "Timken" in its territory, it can, by the use of infringement suits, or the threat of such suits, successfully prevent British Timken or French Timken from

[73] The scheme of "licensing" the mark by appellant and its co-conspirators is itself unlawful and *a fortiori* no defense to the restrictive practices. See *infra*, p. 94 ff.

[74] The origin, use and ownership of the mark "Timken" are described *supra*, pp. 23–25.

manufacturing or selling their products in that area.[75] Conversely, British Timken and French Timken, by the use of similar devices abroad where they have the exclusive rights to the mark, successfully may prevent appellant from manufacturing or selling its products in those areas. The device can also be employed to prevent importers and exporters, distributors, automotive dealers and other firms, from buying bearings from either appellant, British Timken or French Timken and reselling them in the other's territory.

The operation of the trade-mark device to enforce and police a division of territories is aptly described in Handler, *Trade-Marks and the Anti-Trust Laws,* 38 T. M. Rep. 387, 388–9:

> In implementing a division of world markets, some cartels have parcelled among their members rights in a trade-mark on a geographical basis. All the parties sell the same product under the same mark, one operating in the United States, another perhaps in South America, and others in various parts of Europe. The appor-

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[75] This use of a mark as a cartel enforcement device has arisen in other antitrust litigation. *United States* v. *Sperry Corporation*, Civil Action No. 19–175, S. D. N. Y., complaint filed September 1, 1942, consent decree entered September 1, 1942; *United States* v. *The Bayer Co., Inc.*, Civil Action No. 15–364, S. D. N. Y., complaint filed September 5, 1941, consent decree entered September 5, 1941.

For a discussion of the cases and the use of marks to restrain international trade, see Diggins, *Trade-Marks and Restraints of Trade*, 26 Jour. Pat. Off. Society 461 (July, 1944).

tionment of territorial rights in a mark can be an effective device to prevent shipment of the trade-marked product from one market to another. Indeed, under such an arrangement the courts can be used to enforce and police the cartel restriction.

The present case might well be cited as a classic example of such use of a trade-mark to restrain competition.

By virtue of the provision requiring the manufacture of bearings only under the mark "Timken", appellant also has been able to utilize the customs laws of the United States as an instrument for policing the division of territories. In 1921 appellant obtained a registration of the mark (Gov. Phys. Ex. 150; R. 571) and recorded it with the Bureau of Customs in order to detain any importation of bearings carrying the recorded mark (Gov. Phys. Exs. 150; Gov. Ex. 151 (a), 151 (b), R. 1639, 1642).[76] This use of legal means

[76] Significantly, although appellant had other marks which it might have been desirous of protecting against use on importations, it recorded with Customs only the mark which its co-conspirators were forced to use on their bearings (Def. Ex. 87, R. 1972; Gov. Ex. 151–A, R. 1642; R. 949). British Timken was likewise in a position to prevent importations of appellant's bearings into Great Britain under the mark "Timken" (R. 618–619).

Upon the passage of the Trade Mark Act of 1946, appellant was no longer able to use the mark to stop importations (Section 28, 60 Stat. 436; 15 U. S. C. 1098). Appellant, however, thereafter took steps which will once again place it in a position to secure the aid of customs officers. On July 11, 1950, appellant obtained registration of the mark "Timken"

to accomplish an unlawful objective contravenes the Sherman Act. *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809.

The provision against the British and French companies' dealing in bearings under any other mark also prevents these companies from building up good will in any different[6] mark and thus creating competition for appellant from products labeled under such different mark. These provisions are comparable to restrictions in patent licenses illegally limiting the licensees to exploitation solely of the patented products and devices (*National Lockwasher Co.* v. *George K. Garrett Co.*, 137 F. 2d 255, 256 (C. A. 3); *McCullough* v. *Kammerer Corp.*, 166 F. 2d 759, 761 (C. A. 9), certiorari denied, 335 U. S. 813), and are particularly vicious when coupled with provisions of the current contracts which require British Timken and French Timken to cease using the name and mark "Timken" upon the termination of the contract and to reassign to appellant all rights in such mark and name. The effect of coupling such provisions is to put the British and French companies in an almost impossible competitive situation upon the termination of the agreements. As the district court held (Concl., par. 96, R. 987), the retention of good will and

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upon the Principal Register (Reg. No. 527512) which, when recorded with the Treasury Department, will again prevent the importation of bearings carrying that mark (Section 40, 60 Stat. 440, 15 U. S. C. 1124).

competitive dominance built up by the co-conspirators through the use of the name "Timken" depended upon the continued right to use that name; the severance of contractual relations would mean the termination of their ability to profit by years of experience in manufacture and successful business dealings with their customers. Viewed realistically therefore, these provisions provide a guarantee against termination of the unlawful agreements by the co-conspirators. So far as they are concerned, the choice is between continuing the conspiracy and submitting to virtual destruction of their names and good will (Fdg. par. 96, R. 987).

The prohibition against dealing in other marks also has reacted to restrict other American producers in exports to foreign countries. In many sizes and types British Timkin and French Timken, in order to meet requirements of their customers, have had to supplement their production by purchasing from appellant in the United States (R. 112–115). Throughout the period of the conspiracy this has amounted to approximately \$3,000,000 (Gov. Exs. 153, 154, R. 1648, 1649).

Inasmuch as British Timken and French Timken can deal only in bearings marked "Timken" they have been unable to purchase bearings marked with any other names. The necessary result has been that appellant's American competitors have been completely foreclosed from this

substantial market in England and France. Since the parties by direct agreement could not have erected a barrier excluding competitors from these markets (*International Salt Co.* v. *United States*, 332 U. S. 392, 396–7; *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227; *United States* v. *General Motors Corp.*, 121 F. 2d 376, 404 (C. A. 7), certiorari denied, 314 U. S. 618), they cannot legally accomplish that purpose indirectly through the use of trade-marks.

American producers who are not members of this combination constantly have been put at a competitive disadvantage by virtue of the common effort of appellant and its co-conspirators to exploit the mark "Timken" for their exclusive benefit (R. 105, 407–8). Such producers must compete individually against the combined world-wide advertising and promotion of "Timken" products by the three largest manufacturers of such bearings. The tendency of a customer to replace a defective or worn-out bearing with the make of bearing he finds originally installed in his machinery is a well accepted fact in this industry (R. 394–5, 511–2). Thus, each member of the combination has an advantage as against outside competitors in securing replacement business for original installations made by all three of them. This collective activity for the purpose of excluding the outside or individual competitor is clearly prohibited by the Sherman Act. *Associated Press* v. *United States*, 326 U. S. 1, 15.

F. *Participation in foreign cartels*

The foreign cartel arrangements between British Timken and French Timken and their competitors in England, France, and Italy to fix prices, allocate customers, and divide sales were found by the district court to have been consummated with the knowledge, approval, and cooperation of appellant (Fdg., par. 125, R. 996). The arrangements were part of the over-all conspiracy to eliminate competition between the parties and with outsiders and appellant's participation "completed the circle in which the combination operated to forestall competition" throughout the world (Fdg., par. 135, R. 999–1000).

These foreign cartel arrangements, although made abroad, restricted exports by United States bearing producers (Fdg., par. 117, R. 994) and had a direct effect upon the foreign trade of the United States (Fdg., par. 136, R. 1000). For example, the cartel agreement between French Timken and French SKF (Gov. Ex. 65, R. 1436; Gov. Ex. 65A, R. 1438), which was sent to appellant for approval (Gov. Ex. 65A, R. 1438), was carefully considered by all of appellant's top officials (R. 543–544), and was finally approved by appellant (Gov. Ex. 70, R. 1453), fixed quotas for French Timken and SKF for sales in France and the French Empire. The quota of French Timken included "Timken" bearings manufactured elsewhere and imported into France, including those made by appellant and sold to French Timken

under special exception to the territorial allocation (R. 154–155).

This cartel arrangement also provided for agreement on retail prices and prices for all large orders and customers. Thus the export trade of appellant was directly affected since the quantities of bearings that it could ship into France were limited to the quota provisions and, in addition, the prices had to be agreeable not only to French Timken but also to French SKF. (*Supra*, pp. 47–48.)

The Sherman Act prohibits conspiracies and combinations and the impositions of restraints on foreign trade as well as domestic commerce. As the district court properly held (Concl., par. 135, R. 999–1000), restraints on exports and imports are banned. *United States* v. *Nord Deutscher Lloyd*, 223 U. S. 512; *United States* v. *Sisal Sales Corporation*, 274 U. S. 268, 274; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 133–141, 171–172, 185–187; *Thomsen* v. *Cayser*, 243 U. S. 66, 88; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 443, 444 (C. A. 2); *United States* v. *National Lead Co.*, 63 F. Supp. 513, 524, affirmed, 332 U. S. 319; *United States* v. *General Dyestuff Corp.*, 57 F. Supp. 642, 647 (S. D. N. Y.).

Combinations and conspiracies directly affecting the foreign commerce of the United States are, as the district court held (Concl., par. 136, R. 1000), unlawful even though formed outside the jurisdiction of the United States. *United*

States v. *Nord Deutscher Lloyd,* 223 U. S. 512; *United States* v. *Hamburg-Amerikanische P. F. A. G.,* 200 Fed. 806, 807 (C. C. S. D. N. Y.); *Thomsen* v. *Cayser,* 243 U. S. 66, 88.

The foreign cartel arrangements were held by the district court to be illegal (Concls., pars. 126, 135, R. 996, 999–1000) not only as direct restraints upon United States foreign commerce (Fdg., par. 117, R. 994), but also as part of the over-all conspiracy to eliminate competition (Concl., par. 126, R. 996). The arrangements were links in the conspiratorial chain designed to suppress competition on a world-wide basis (Concl., par. 135, R. 999–1000) and would have violated the Sherman Act even if they had related solely to the commerce of foreign nations. See *United States* v. *National Lead Co.,* 63 F. Supp. 513, 524, affirmed, 332 U. S. 319.

II

THE RESTRAINTS CANNOT BE JUSTIFIED AS ANCILLARY TO SOME LAWFUL "MAIN PURPOSE"

A. *The restraints here imposed were unreasonable per se, and therefore cannot be justified as "ancillary"*

In order to excuse, under the "ancillary restraints" doctrine, the restraints which it imposed upon competition, appellant must show not only that the imposition of the restraints was not its primary purpose, but also that the re-

straints were reasonable in scope.[77] The very case upon which appellant relies so heavily as stating the doctrine makes this clear. *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. A. 6), modified and affirmed, 175 U. S. 211.

The "ancillary restraints" doctrine is necessarily based upon the rule of reason. Restraints which would otherwise be unlawful are said to be permissible, if reasonable, and if ancillary or incidental to some legitimate main transaction. But the doctrine obviously cannot apply to restraints which are unreasonable *per se*, since such restraints are by definition excepted from the rules of reason.[78] The district court correctly held that the restraints here involved unmistakably fall in the unreasonable *per se* category (Concl., par. 143, R. 1001).

It is, of course, settled law that price fixing is illegal *per se*.[79] It is likewise settled that the

[77] The burden of proof in establishing the defenses and showing that the restraints imposed were reasonable rested upon appellant. *United States* v. *Paramount Pictures*, 334 U. S. 131, 148; *United States* v. *Crescent Amusement Company*, 323 U. S. 173, 188.

[78] Whatever may be the authority of *United States* v. *General Electric Co.*, 272 U. S. 476, cited by appellant, after this Court's decision in *United States* v. *Line Material Company*, 333 U. S. 287, the former case obviously was decided on the basis of statutory patent rights, and was not an application of the ancillary restraints doctrine. Consequently, it is in no way inconsistent with the conclusion that restraints which are unreasonable *per se* cannot be justified as ancillary to a main purpose.

[79] See *United States* v. *Line Material Co.*, 333 U. S. 287, 307, and other cases collected, *supra*, p. 69, n. 69.

allocation of territories cannot be justified as reasonable. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469; *United States* v. *Aluminum Company of America,* 148 F. 2d 416 (C. A. 2); *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271 (C. A. 6), modified and affirmed, 175 U. S. 211. In the *Addyston* case, Judge Taft, in rejecting the argument that division of trade territories and price-fixing agreements were reasonable, said that "the association of the defendants, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly" (85 Fed. at 291). Years later, Judge Learned Hand speaking of the same restraints in the *Aluminum* case, said (148 F. 2d at 427): "It is settled, at least as to § 1, that there are some contracts restricting competition which are unlawful, no matter how beneficent they may be; no industrial exigency will justify them; they are absolutely forbidden."

What the law condemns as unreasonable *per se* cannot be justified on the basis of any claim of business necessity, suppression of competitive evils, or some incidental benefit to the public. As this Court said of price fixing in *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226, "Whatever economic justification particular price-fixing agreements may be thought to have,

the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." Hence, the fact that the division of territories or price fixing might have been convenient or expedient for appellant in its business arrangements with Dewar or British Timken and French Timken (such as the alleged "joint venture" or "licensing" of trade-mark rights) could in no way excuse appellant from these fundamental violations of the Sherman Act even if in fact the restraints could in any real sense be viewed as ancillary. In Sections B and C, *infra*, it is pointed out that not only was there no joint venture or lawful licensing of trade-marks, but the restraints on competition themselves have been and are the primary purpose of the agreements among appellant and its co-conspirators.

B. *The restraints were in no sense "ancillary" to a joint venture*

The exact nature of appellant's contention that the restrictive agreements were ancillary to a "joint venture" undertaken by appellant and Dewar is not entirely clear from its statements at the trial or the brief filed with this Court. It appears, however, to be of this nature: appellant and Dewar, pursuant to negotiations undertaken in 1927 (Heads of Agreement, Def. Ex. 15, R. 1730) entered into a "joint venture" to purchase

British Timken, to create a French corporation (French Timken), and to acquire a German corporation (German Timken), for the purpose of manufacturing Timken-type tapered roller bearings. Inasmuch as Dewar was fearful of competition from appellant and the possible adverse effect upon British Timken of such competition, appellant agreed not to compete with British Timken in the sale of the common product. Appellant, on the other hand, having invested its money jointly with Dewar in British Timken, was fearful in turn of the adverse effect upon it of competition from British Timken, and accordingly extracted from British Timken, as well as from French Timken and German Timken, an undertaking by them not to compete in the territory that appellant had staked out for itself.

The defense that the restraints upon competition were ancillary to a main transaction known as a "joint venture" was rejected by the district court (Concl., par. 150, R. 1003). That court found the evidence would not support a finding that the "joint venture" between appellant and Dewar was the main transaction; on the contrary, it explicitly found that the "arrangements were made to carry on effectively the combination, to eliminate competition between the parties and to frustrate any competition of outsiders" (Fdg., par. 154, R. 1004). It found from the evidence that the "only conclusion which may properly be drawn is, that the restraints upon competition

were not ancillary to the 'joint venture'" (*ibid.*).[80]

In finding that the combination to eliminate competition was the primary or main transaction, the district court observed that the restrictive agreements which were part of the combination were in existence many years prior to the alleged "joint venture." The 1928 agreements providing for the joint purchase of British Timken and the establishment of French Timken followed by almost twenty years the original restrictive agreements between appellant and predecessors of British Timken and French Timken (Fdg., par. 152, R. 1003). Thus the "joint venture" arrangements in 1928 did not mark the beginning of *new* business contacts (Fdg., par. 153, R. 1003–4). On the contrary, they merely extended long existing arrangements between potential competitors who

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[80] A defense based upon the doctrine of ancillary restraints, similar to the "joint venture" defense in this case, was offered in the *United States* v. *National Lead Company*, 63 F. Supp. 513, affirmed, 332 U. S. 319. There the court in rejecting the defense pointed out that in the original 1920 agreements, and in each of the subsequent agreements which resulted in the creation of the companies ordered to be divested, "the same purpose, to restrain trade in order to avoid competition, was paramount" (63 F. Supp. at 524).

The defense that territorial restraints may be valid if reasonable and ancillary to an exchange of know-how was rejected on the same grounds in *United States* v. *General Electric Co.*, 82 F. Supp. 753, 845–7, 889 (D. N. J.). Appellant relied unsuccessfully on such a defense in the court below (Concl., par. 178, R. 1009), but has abandoned it in this Court.

continued such arrangements in order to continue to escape each other's competition (Fdg., par. 155, R. 1004).

Not only were the restrictive agreements not ancillary to any "joint venture" between appellant and Dewar,[81] but the Dewar-appellant joint purchase of British Timken was not a "joint venture" since, as a matter of fact, no such relationship ever existed. The non-existence of the "joint venture" relationship is clearly demonstrated by the record; and, as the district court pointedly observed, "The repeated assertion that it [appellant] was in a joint venture or was a member of a partnership does not make it so." (Fdg., par. 160, R. 1005.)

The Dewar-appellant relationship falls far short of meeting the familiar legal criteria of a "joint venture." The Court of Appeals for the Sixth Circuit has laid down tests for determining what constitutes a "joint venture" in *Detachable Bit Co.* v. *Timken Roller Bearing Co.*, 133 F. 2d 632, 635.[82] That court in holding that there had

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[81] At the trial appellant also argued that the restraints were ancillary to its purchase of British Timken and French Timken stock (Op., par. 139, R. 1000–1). Apparently realizing the inconsistency of this argument with the claim that the restraints were ancillary to a "joint venture," appellant has not relied upon it in this Court.

[82] Timken had been sued for breach of an alleged fiduciary duty not to compete with Detachable, the latter claiming that the arrangement had constituted a joint venture. Timken denied that there had been a joint venture relationship, con-

not been a "joint venture" between Timken and Detachable said (p. 635):

> A variety of elements have, from time to time, been considered as pointing to a joint venture, although perhaps not any one of them is conclusive. Among them are to be found agreements for sharing profits or losses as principals * * *; the authority of each party to act for both in respect to the means or agencies employed to execute a common purpose * * *; the incurring of joint obligations for the acquisition of joint rights * * *. Perhaps the most important criterion of a joint venture is the joint control or management of the property used in accomplishing its aims.

The element of control is lacking in the instant case. The evidence is uncontroverted that both British Timken and French Timken were managed and operated by Dewar and that, except for powers posessed by virtue of its stock ownership and the agreements, appellant had no control over the business conduct of either foreign company (Fdg., par. 156, R. 1004). The foreign

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tending that under the settled law a joint venture must have the following essential elements:

"(a) It must be contractual in origin, and the participants must in effect assume the relation of partners; (b) there must be an arrangement to share profits and losses; (c) there must be a joint control over the property used in accomplishing its purpose; (d) it cannot be a corporation nor can the business of a corporation be conducted as a joint venture" (Brief of Defendant, p. 7, N. D. Ohio, Eastern Div., Equity No. 5761).

companies had carefully "retained their corporate independence and jealously guarded their interests in dealings" with appellant (Fdg., par. 157, R. 1004–5). But even if the stock investment of appellant in the British and French companies had indicated a pre-existing "joint venture" in the parties' own judgment, it is clear that by 1934 when British Timken became a "public" company, neither party believed such relationship existed (Fdgs., pars. 157, 158, 159, R. 1004–5). Similarly, there was no agreement between Dewar and appellant to share profits or losses as joint principals or venturers. Nor did the so-called "joint venture" here comply in other respects with the requirements of a genuine joint enterprise.

Appellant, apparently recognizing the utter failure of the record to support a claim that there was a true joint venture, asserts that the Dewar-appellant arrangement constitutes a "joint venture in the layman's sense." The exact nature of what appellant means by a "joint venture in the layman's sense" is not very clear. In the present context it would appear to partake principally of the elements of a conspiracy in restraint of trade.[83]

[83] Appellant's counsel was unable at the trial to determine upon a single or consistent definition of "joint venture in the layman's sense." At times the deal between Dewar and appellant was the joint venture (R. 934), or the partnership. At other times the joint venture or partnership was among the three corporations, British Timken, French Timken and

In effect appellant asks this Court to treat its foreign venture or "partnership" as though appellant had erected a plant abroad or established a subsidiary there to manufacture bearings. If that had been the case there would not have been restrictive agreements prohibiting appellant from making sales anywhere in the world; appellant could have made sales at whatever price it pleased; it could have erected additional plants anywhere it thought they were needed. Appellant has not been able to do any of these things because of its obligations under its agreements with British Timken and French Timken.

The plain fact is, as the district court concluded, that appellant did not build plants in Europe or purchase subsidiaries abroad. Instead it "acquired substantial interests in a dominant manufacturer of bearings in England, participated in the formation of and invested in the stock of a potential competitor in France" (Fdg., par. 160; R. 1005).

There is no magic in the relationship between a stockholder and a corporation which will support an agreement between them not to compete. Even where stock ownership is sufficient to constitute voting control, agreements not to compete are not thereby legalized. It has repeatedly been held that common ownership, financial integra-

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appellant (R. 934). And at one point British Timken was an "instrumentality" of appellant like a wholly owned subsidiary or just a plant established abroad (Fdg. 160, R. 1005).

tion, parent-subsidiary relationship, is not a defense to agreements not to compete between affiliated corporations, if they are in fact separate companies; and the decisive fact here is that these co-conspirators were separate companies, separately operated. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211; *United States* v. *General Motors Corp.*, 121 F. 2d 376, 404 (C. A. 7), certiorari denied, 314 U. S. 618.

Appellant relies upon *United States* v. *Bausch & Lomb*, 45 F. Supp. 387, 398 (S. D. N. Y.), affirmed, by an equally divided vote, 321 U. S. 707, as authority for insulating from the Sherman Act trade-restraining agreements among parties to a "joint venture". But the *Bausch & Lomb* case involved a vertical arrangement between a manufacturer and a distributor, i. e., "a joint enterprise in which one will produce and the other market the commodity" (45 F. Supp. at 398), and has no application to an arrangement between competing manufacturers. Moreover, the *Bausch & Lomb* case did not involve mutual covenants between the parties not to compete. The restraints were imposed solely upon the manufacturer, Bausch & Lomb. The distributor, Soft-Lite, could manufacture itself, sell its products wherever it pleased and authorize any other manufacturers it desired to manufacture for it in competition with Bausch & Lomb.

Appellant also relies by analogy upon the dictum in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 281 (C. A. 6), modified and affirmed, 175 U. S. 211, in support of the lawfulness of an agreement by a partner not to compete with the partnership. This dictum can provide no possible support for the type of restrictions here which resulted in an agreement not to compete between corporations producing like goods. Judge Taft was referring to simple, *one-way* restrictions, involving only agreements by partners not to compete with the partnership. He says nothing about an agreement by the partnership not to compete with the partner.

The restrictions imposed in the instant case are anything but simple, one-way restrictions. They are reciprocal, mutual covenants whereby appellant agrees to restrictions upon itself for the benefit of its co-conspirators and the co-conspirators agree to restrictions upon themselves for the benefit of appellant and each other.

C. *The restrictions cannot be justified as ancillary to the licensing of the name "Timken"*

Appellant's contention that the restraints which it imposed upon competition were ancillary to the licensing of the name "Timken", and the protection of its interests in that name, appears to rest upon the proposition that appellant has the right under the laws of various jurisdictions, including the United States, to license the name,

and that this gives it the right to impose restraints upon competition as an incident thereto.

Baldly stated, this defense seems to be that restraints which, considered by themselves, would be patently unreasonable, are somehow legalized if they are incidental to the licensing of a trade-mark. Apart from the fact that the restraints here were not ancillary in character (*infra*, pp. 114–6), there are several insuperable difficulties with this defense. First, it rests upon the premise that a trade-mark confers a species of monopoly which its owner is entitled to exploit as effectively as possible even if the method chosen involves agreements to allocate territories, fix prices, and restrict the competition of others. But, as will be demonstrated, a trade-mark does not give exclusive rights to anything but the mark itself, and that only in a limited way. It carries with it far fewer rights than does a patent, yet even a patent monopoly cannot be extended beyond its terms. The restraints here could not be justified as ancillary to exploitation of a patent monopoly, and *a fortiori* cannot be justified in connection with trade-mark licensing. Second, appellant does not own the trade-mark Timken in many of the foreign countries in which it is purportedly "licensing" it. The "equitable ownership" in the mark which, it is asserted, results from the agreements between appellant and its co-conspirators is simply a label used to describe the unlawful trade restraining obligations which the parties

have assumed to each other. By the same reasoning, the parties could be said to have acquired "equitable ownership" of the respective territorial markets which have been unlawfully allocated to them by the agreements.

Far from furnishing a justification for other restrictive practices, the so-called trade-mark licensing, the district court found, is itself a restrictive device in furtherance of the conspiracy (*supra,* pp. 74–80). Even assuming the applicability of the "ancillary restraints" doctrine upon which appellant relies, such doctrine obviously can only come into play if the "main transaction" is lawful.

1. *A trade-mark may not be used as a device for restraining commerce*

A trade-mark is not a legal monopoly. It does not give any exclusive right to manufacture, use or sell a product within the territory of the nation recognizing the right, but is merely a means of identifying the source of origin of goods.[64] In *United Drug Company* v. *Rectanus Company,* 248 U. S. 90, ~~97~~-98, this Court stated:

> The owner of a trade-mark may not, like the proprietor of a patented invention,

[64] Although the Trade Mark Act of 1946, 60 Stat. 427, 15 U. S. C. 1051, *et seq.*, was enacted long subsequent to most of the acts in furtherance of the conspiracy, its provisions are pertinent as reflecting the present policy of the law toward trade-marks. The Act contains the following classic definition of a trade-mark: "any word, name, symbol, or device or

> make a negative and merely prohibitive use of it as monopoly. * * *
>
> In truth, a trade-mark confers no monopoly whatever in a proper sense, but is merely a convenient means for facilitating the protection of one's good-will in trade by placing a distinguishing mark or symbol—a commercial signature—upon the merchandise or the package in which it is sold.

And see *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403, 412; *Columbia Mill Co.* v. *Alcorn,* 150 U. S. 460, 463; *Canal Co.* v. *Clark,* 13 Wall. 311, 322. The right of the seller to protect his mark is a right to prevent use of it by others in such a way as to confuse a purchaser as to the source of origin of the goods. The mark is not protected as such, but only as a symbol of the good will of the business it signifies. *American Steel Foundries* v. *Robertson,* 269 U. S. 372, 380; *United Drug Co.* v. *Rectanus Co.,* 248 U. S. 90, 98; *Hanover Star*

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any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others." Sec. 45, 60 Stat. 443, 15 U. S. C. 1127.

The Act consistently recognizes designation of the source of origin as the inherent function of a trade-mark, providing, for example, that any assigned registration may be cancelled at any time if the registered mark is being used "so as to misrepresent the source" of goods or services (Sec. 10, 15 U. S. C. 1060; see also Sec. 33 (b) (3), 15 U. S. C. 1115 (b) (3)). It further provides for cancellation of a registration at any time "if the registered mark becomes the common descriptive name of an article or substance" (Sec. 14 (c), 15 U. S. C. 1064 (c)).

Milling Co. v. *Metcalf, supra,* at 414; Nims, *Unfair Competition and Trade-Marks* (Fourth Ed., 1947) Sec. 15. Even the right of the owner to exclusive use of the mark is not qualified. A trade-mark is not a monopoly of the use of the word or combination of words, but only a right to prohibit the use of the word or words by others insofar as it is necessary to protect the owner's good will and the public against deceit.[85]

Since a trade-mark is not a monopoly or even a right in gross, the conditions under which it can be licensed are limited, and in no event can such licensing furnish a justification for ancillary restraints of trade. The trade-mark owner is entitled to "license" its use by others only insofar as the public is not deceived, and only upon terms which will protect his right to identify properly his goods as to source of origin. Since he has no exclusive right to make or sell a product within a prescribed territory, as a patentee does, he is not entitled to any ancillary provision to protect such

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[85] In *Prestonettes, Inc.* v. *Coty*, 264 U. S. 359, 368, this Court held that "when the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth." This principle was recently again applied in *Champion Spark Plug Co.* v. *Sanders*, 331 U. S. 125, where the sale of second-hand spark plugs bearing the mark of the original manufacturer was held lawful since "the plugs, though used, are nevertheless Champion plugs and not those of another make" (331 U. S. at 128), and stated that "full disclosure gives the manufacturer all the protection to which he is entitled" (331 U. S. at 130).

a territorial product monopoly.[86] Territorial division and price fixing bear no conceivable relation to his right merely to identify his product. For these reasons, negative covenants which restrict competition in the sale of a product cannot be supported by a trade-mark "license."

The ancillary restraint doctrine is based upon the rationale that the primary transaction is not only lawful but should be encouraged in the public interest. Trade-mark licensing is not such a primary transaction. The use of the trade-mark by one who is not its owner is almost certain, except under very limited circumstances, to lead to a confusion in the mind of the consumer as to the source of origin of the product which he is buying. Hence, the assignment of trade-marks is not permitted unless the business and good will is also transferred, because of the likelihood of fraud on the public, and the "licensing" of trade-marks, even in those limited situations where it is permitted, is carefully circumscribed. Nims, *Unfair Competition and Trade-Marks* (Fourth Ed., 1947), Sec. 17, 22; Derenberg, *Trade Mark Protection and Unfair Trading* (1936) Sec. 51.

There is no warrant under the traditional law of trade-marks for sanction of trade-restraining agreements as "ancillary" to even legitimate use

[86] In fact, as seen above, he is not even entitled to exclusive use of the trade name, except insofar as it may be necessary to avoid confusion as to the source of origin of goods.

of a trade-mark.[87] A trade-mark is not the product of invention, nor does it carry out any constitutional intent to promote the progress of science and useful arts. The public receives no benefit such as the advancement of science, or disclosure of an invention, from the owner of the trade-mark. As was pointed out in the *Trade-Mark Cases*, 100 U. S. 82, 94:

> The trade-mark may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it. At common law the exclusive right to it grows out of its *use*, and not its

[87] The Trade Mark Act of 1946, 60 Stat. 427, 15 U. S. C. 1051 *et seq.*, reaffirms the subordination of trade-mark rights to the antitrust laws. Section 33 (b) (7) of the Act (15 U. S. C. 1115) penalizes use of a trade-mark "to violate the antitrust laws of the United States." The reasons for this provision were cogently stated by Senator O'Mahoney (92 Cong. Rec. 7872-7873):

"There have been occasions, however, when trade-marks have been misused. There have been occasions when trade-marks have been used in connection with cartel agreements. There have been occasions when trade-marks have been used to restrain the trade and to the disadvantage of little business.

* * * * *

"* * * It is a matter of great importance to the consumers of the United States that they shall know that trade-marks are being used as it was intended under the common law that they should be used. * * * *But it is of such great importance to the public of the United States that restraints of trade shall not be permitted, that the Senate inserted this amendment to make it a defense to an infringement suit* as well as to make it a ground of contestability if it should be shown that the registrant was using the mark itself to violate the antitrust law." [Emphasis supplied.]

> mere adoption. By the act of Congress this exclusive right attaches upon registration. But in neither case does it depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation.

There is also no similarity in the rights granted. A patent confers a monopoly for a limited time. A trade-mark is a commercial signature which may last perpetually. The two should not be confused. Indeed, this Court has adverted to "the fundamental error of supporting that a trade-mark right is a right in gross or at large, like a statutory copyright or a patent for an invention, to either of which, in truth, it has little or no analogy." *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 97.[88]

Even if it be assumed, *arguendo*, that, as the owner of the trade-mark "Timken", appellant has the same rights as it would under a patent, the restraints here imposed cannot be justified. The agreements in this case include at least four

[88] A similar difference is to be noted between trade-marks and copyrights. See Chief Justice Holmes in *Chadwick* v. *Covell*, 151 Mass. 190, 193-4, 23 N. E. 1068, 1069:

"* * * When the common law developed the doctrine of trade-marks and trade names, it was not creating a property in advertisements more absolute than it would have allowed the author of Paradise Lost, but the meaning was to prevent one man from palming off his goods as another's, from getting another's business or injuring his reputation by unfair means, and, perhaps, from defrauding the public."

types of provisions which would not be embraced within a patent monopoly: (1) There are territorial restraints with respect to areas in which appellant does not own the trade-mark "Timken," and could not, therefore, "license" it. Plainly a patentee could not, under the shield of his patent, restrain trade in countries where that patent was not in force.[89] (2) There has been widespread price fixing. Cf. *United States* v. *Line Material Co.*, 333 U. S. 287, 314-315; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 175. (3) Appellant agreed not to permit its customers to sell in territories allocated to British and French Timken. A patentee may not control a patented article once it has been sold.[90] (4) British Timken and French Timken have agreed to manufacture tapered roller bearings only under the name "Timken." A patentee may not require his licensee to manufacture only under the patent. *McCullough* v. *Kamerrer Corp.*, 166 F. 2d 759, 761 (C. A. 9), certiorari denied, 335 U. S. 813.

The court below correctly held that "Even the patent monopoly is not broad enough to encompass the power to engage in conduct and practices to eliminate competition such as were employed"

[89] *United States* v. *National Lead Co.*, 63 F. Supp. 513, 524, affirmed, 332 U. S. 319. This is analogous to an attempt to use patents to control trade in unpatented goods, a practice consistently condemned by this Court. E.g., *International Salt Co.* v. *United States*, 332 U. S. 392; *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488.

[90] *United States* v. *Univis Lens Co.*, 316 U. S. 241, and cases cited, p. 250.

here (Concl., par. 197, R. 1013). *A fortiori* the public interest requires that trade-mark rights be kept within their proper bounds and not used as a device for restraining competition (Concl., par. 200, R. 1014).

2. *Appellant did not own and hence could not "license" the name "Timken" in many countries where it claims to have been a licensor*

The district court held that, even assuming the restraints to be in fact ancillary to trade-mark licensing and the law to permit such ancillary restraints, appellant did not own the mark "Timken" in many areas of the world and could not, therefore, license it in such areas (Fdg., par 182, Concls., pars. 189, 190, R. 1009, 1011).

Appellant's own non-competitive conduct was responsible for its not owning the mark "Timken" in the areas of the world in which it agreed not to sell its products. In implementing the division of world markets, it parceled out rights in the name "Timken" on a geographical basis. In addition to confusing the public as to the real origin of the respective products of appellant and its co-conspirators, with the inherent effect of dividing and diluting the significance of the name "Timken" as a mark of identification (R. 104–5, 394–5, 407–8, 512), appellant's conduct resulted in the registration and ownership of the mark "Timken" by others in areas allotted to British Timken and French Timken (Fdg., par. 183, R. 1009–10).

Had appellant's object at any time from 1909 to the present been the competitive use of its mark, it would have pursued an entirely different course of action. It could readily have sold its products wherever possible under the "Timken" mark; registered it in its own name wherever possible; contested British Timken's and French Timken's right to use it in every area where they asserted that right; in those areas where it was unable to prevent those companies from using the mark, it could have possibly obtained non-exclusive rights, and if not it could have developed new marks for its own product in such areas.[91]

These would have been the traditional competitive ways for appellant to deal with its trademark rights. A competing seller ordinarily jealously guards the symbols used to prevent simulation of his goods by actual or potential competitors. Appellant, however, directed its inquiry and planning to the question not how it might protect the name "Timken" but how it might acquire rights in that name without actually entering into competition in contravention of its agreements not to compete (Fdgs., pars. 153, R. 1003). Thus, the typical competitive procedures held no attraction for appellant. They would have defeated rather than achieved what

[91] The mark "TRBCO," for example, was registered by appellant in more countries in the world than was the mark "Timken" (D. Ex. 87, R. 1972-7).

the court below found as a fact to be the real objective, namely, to prevent competition.[92]

Ownership rights in a trade-mark arise *only* from *use* of the mark in connection with the sale of products. The owner's rights then are confined to the territory within which he sells his goods. On the basis of such use, the law of this country recognizes that the user obtains certain common law rights of ownership, limited as described above. *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 97, 98; *Trade-Mark Cases,* 100 U. S. 82, 94. A statutory registration may be obtained on the basis of use (Trade-Mark Act of 1946, Secs. 1, 45, 15 U. S. C. 1051, 1127). A registration may be attacked and cancelled on the basis of prior use by others.[93] In fact, appellant's registrations in those few countries within British Timken territory where it obtained them were subject to being set aside because of British Timken's prior use (R. 609-10, 613-14; See Fdg., par. 182, R. 1009; Appellant's Br. 104). Trade-mark ownership

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[92] Fdg., par. 188, R. 1010-11: "The evidence conclusively proves that defendant entered into the agreements not for the purpose of exercising its right to protect the trade mark 'Timken' from its unlawful use by British and French Timken nor to protect the public from British or French Timken passing off their products as those of defendant, but *for the purpose of preventing competition in the sale of bearings.*" [Emphasis supplied.]

[93] A registration on the Principal Register may be cancelled for prior use at any time during the five-year period before it becomes incontestable (Sec. 14, 15 U. S. C. Sec. 1064). A registration on the Supplemental Register may be cancelled for prior use at any time (Sec. 24, 15 U. S. C. Sec. 1092).

arising from use, and possible subsequent registration, is the only form of such ownership recognized by law.

Because of its agreements not to sell its products in territories allotted to British Timken and French Timken, appellant has never obtained rights on the basis of user within those countries. Though it has obtained registrations in a few of the countries outside its allotted territories, through the cooperation of its co-conspirators, it has not registered the mark in most of the territories allocated to the co-conspirators. Appellant suggests that it has obtained registrations in most of the countries in British and French Timken territory, but the chart on pages 108–109 shows the actual status of registrations of "Timken" throughout the world. Thus the name "Timken" has never had a world-wide connotation as identifying appellant's products, but has had at least three different connotations depending upon the areas of the world in which it was used. In the areas allotted to British Timken and French Timken, the name signified their products. Hence appellant's rights in the name outside the immediate territory in which it was selling were completely non-existent.

Appellant admits that it has never had any common law rights in the name "Timken" as a trade-mark in the areas of the world allotted to British Timken and French Timken. It must, of course, admit that it is not the registered owner

in most of those areas, as the record speaks for itself (Def. Ex. 87, R. 1972). Appellant bases its contention that it has licensed the mark "Timken" upon the claim, rather, that it is the "equitable owner" of that mark in those areas, and that British Timken and French Timken are its "equitable licensees."

Appellant has offered varied explanations for this claim. For example, it refers to the fact that "Timken" was the surname of the founder of the company, and that it is a part of the corporate name.[94] Again, describing the use of the name

[94] That the name "Timken" is in its corporate name, happens to be the surname of the founder of the corporation, and that appellant has registered the name in certain countries, do not entitle appellant to use it everywhere in the world, but on the contrary, weaken its claims to world-wide trade-mark rights. The fact that "Timken" is a surname used by appellant and others as a trade name to identify tapered roller bearings means that it is not a "technical trade-mark" (R. 620–1, 624). *Herring-Hall-Marvin Safe Company* v. *Hall's Safe Company*, 208 U. S. 554, 559.

A mark consisting merely of a surname, although registered under the Trade Mark Act of 1920 (Sec. 1, 15 U. S. C. 121), was unregisterable under the Trade Mark Act of 1905 (Sec. 5, 15 U. S. C. 85) and cannot be registered on the Principal Register provided for by the Trade Mark Act of 1946, except upon evidence that it has become distinctive of the applicant's goods, five years continuous use constituting prima facie evidence (Sec. 2 (e), (f), 15 U. S. C. 1052 (e), (f)). In Great Britain and the British colonies, also, a strong showing of distinctiveness is required to obtain registration of a surname (R. 617, 620, 622–4, 635). As early as June 1921 appellant's counsel advised that, in addition to British Timken's prior use in Great Britain, "there are numerous difficulties

COUNTRIES IN WHICH THE TRADE MARK "TIMKEN" WAS NOT REGISTERED.

(Based on D. Ex. 87, R. 1972–7)

AS OF:

(1) July 16, 1909 (The date of the E&OA agreements).
(2) April 6, 1920 (The date of the Wolseley agreements).
(3) December 31, 1924 (The date of the first British Timken agreement).
(4) January 1, 1928 (The date of the second British Timken agreement).
(5) December 29, 1934 (The date of the third British Timken agreement).
(6) November 28, 1938 (The date of the "Tripartite" agreement).
(7) July 31, 1946 (The date original complaint was filed).

(1) ON JULY 16, 1909, "TIMKEN" WAS NOT REGISTERED IN THE FOLLOWING 118 COUNTRIES (i. e., THE ENTIRE WORLD): (Unless otherwise indicated, registration is in Appellant's name)

(2) Registered between 7/16/09 and 4/6/20: Still not registered in the 110 countries below this line.	Argentina Chile	China Germany [4]	Japan Mexico	Peru Venezuela
(3) Registered between 4/6/20 and 12/31/24: Still not registered in the 84 countries below this line.	Australia Austria Belgium Brazil Bulgaria Canada Czecho-Slovakia	Denmark Egypt France [2] Finland Hungary India [3] Italy	Jugo-Slavia Luxembourg Netherlands Norway Portugal Rhodesia (Southern)	Roumania Spain Sweden Switzerland Turkey United States
(4) Registered between 12/31/24 and 1/1/28: Still not registered in the 82 countries below this line.	Greece	Poland		
(5) Registered between 1/1/28 and 12/29/34: Still not registered in the 75 countries below this line.	Eire [1] Newfoundland	New Zealand [1] Philippine Islands	Russia Siam	South Africa [1]

See footnote at end of table.

(6) Registered between 12/29/34 and 11/28/38:	Colombia	Hong Kong	Manchukuo	Trinidad & Tobago
	Cuba	Jamaica	Puerto Rico	Uruguay
Still not registered in the 66 countries below this line.	Hawaii			
(7) Registered between 11/28/38 and 7/31/46:	Afghanistan	Ecuador	Iceland [3]	Panama
	Belgian Congo	Ethiopia	Iran [3]	Paraguay
	Bolivia	Great Britain [1-5]	Iraq	Salvador
	Costa Rica	Guam	Liberia	Straits Settlement [1]
	Curacao	Guatemala	Morocco	Tangier Zone
	Dominican Republic	Haiti	Nicaragua	Tunis
Not registered in the 40 countries below this line at time of trial.	Dutch Guiana (Surinam)	Honduras		
	Bahama Islands	Dominica	Mauritius	Sierra Leone
	Basutoland [1-6]	Dutch East Indies [4]	Nigeria	South African Union
	Bechuanaland [1-6]	Eritrea	Northern Rhodesia [1-6]	South-West Africa [1-6]
	Bermuda	Fiji Islands	Nyasaland Protectorate	Sudan
	British Guiana [1-6]	Gambia	Palestine	Switzerland Protectorate
	British North Borneo	Gold Coast [1-6]	Portuguese Colonies	Tanganyika Territory
	Burma	Kenya Colony	St. Lucia	Travancore
	Ceylon	Lebanon	St. Vincent	Uganda Protectorate
	Congo Free State	Leeward Islands [4]	Sarawak	Virgin Islands
	Cyprus	Malta & Gozo	Seychelles Islands	Zanzibar

[1] Registration by British Timken.

[2] Registration by SMG, later transferred to French Timken. D. Ex. 87, R. 1972-7 shows registration in 1929.

[3] Registration by British Timken and Appellant apparently by each separately. British Timken registered in Iran and Iceland in June and July 1947, after the complaint was filed.

[4] Registration by Prausnitzer, later transferred to DTG. (Not included in D. Ex. 87, R. 1972-7. See Stipulation R. 598-599.)

[5] D. Ex. 87, R. 1972-7 lists the Great Britain trade mark registration as issuing 8/9/38. The evidence shows, however, that it issued in February 1940 (Gov. Ex. 190 and attachments R. 598).

[6] Registered between July 31, 1946 and February 20, 1947 (November, 1947, in the case of British Timken's registrations.

"Timken" by the predecessor of British Timken under the 1909 agreements, appellant has characterized this as "essentially an attempt to project its good will ahead of its business" (Appellant's Br. 102, 112), and to project "its reputation into the territory of the British licensee ahead of American Timken's use there of the name 'Timken' as a trade-mark" (*ibid.*).[95] In dealing with the 1928 agreements, appellant contended that the contract provisions (*supra*, p. 35) for reversion of the mark to appellant at the

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in connection with the registration of the word 'Timken' by reason of its being a surname" (Def. Ex. 79, R. 1963).

In addition, since the name "Timken" covered a product originally patented, and has always been used to refer to one type of bearing, the name may have even become generic, *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169. Appellant's British counsel in fact stated in September 1925 that "the name has been frequently used in a context which suggests that it describes a type of bearing rather than a trade origin" (Def. Ex. 99, R. 2005; see also *supra*, n. [redacted] 32).

[95] This Court's statements in *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 98, are sufficient answer to appellant's claim that it could acquire any trade-mark rights by "projecting" its reputation ahead of its use of the mark:

"It results that the adoption of a trade-mark does not, at least in the absence of some valid legislation enacted for the purpose, project the right of protection in advance of the extension of the trade, or operate as a claim of territorial rights over areas into which it thereafter may be deemed desirable to extend the trade. And the expression, sometimes met with, that a trade-mark right is not limited in its enjoyment by territorial bounds, is true only in the sense that wherever the trade goes, attended by the use of the mark, the right of the trader to be protected against the sale by others of their wares in the place of his wares will be sustained."

expiration of the agreements meant that British Timken and French Timken must at such time abandon use of the name "Timken" and allow appellant to establish rights in it, or that they must assign the mark together with the good will of their businesses to appellant; and that these "rights" of appellant to establish if possible its own trade-mark rights in the future made appellant an "equitable owner" of the mark in 1928 (R. 612).

Appellant relies upon the opinion testimony of an expert witness as to the British trade-mark law (R. 612), which, it is contended, establishes that the agreements between appellant and British Timken make the former the equitable owner of the mark in Great Britain.[96] But a careful reading of this testimony reveals that the expert testified in substance that appellant has no legal rights to the mark in England, but only a contractual right against British Timken to come to fruition in 1965 when (and if) the current agreements terminate and not renewed (R. 627–8).[97] This con-

[96] It should be noted that from 1909 to 1928 British Timken was the sole user of the mark in Great Britain, and there is no basis for any contention that appellant had an equitable or any other kind of interest in it during that period.

[97] Appellant has cited no statutory or judicial authority for these novel propositions. Nor does the record contain any contemporaneous reference to such asserted rights to "equitable ownership" of a trade-mark. Appellant's claim appears to be wholly an afterthought which originated following the charge of antitrust law violation.

tractual obligation of British Timken requires it to abandon the mark itself and to assist appellant to secure it if possible. It is difficult to see how, assuming that this relationship may be characterized as giving "equitable ownership" of the mark to appellant, this characterization converts what would otherwise be unlawful restraints of trade into permissible "ancillary" restraints. That "equitable ownership" might be recognized under British law is no more a defense than is the fact that price-fixing may be lawful in Great Britain. And surely whatever rights a present owner of a trade-mark might have to protect his mark would not adhere to one who merely has a contingent expectancy of becoming an owner in 1965 ~~1905~~. There is no suggestion in the testimony of the expert witness for appellant that one having an "equitable interest" may license that interest to any other person, much less to the legal owner.

It is clear from the record that one of the primary methods by which appellant has fettered its principal potential competitors has been to require them to manufacture tapered roller bearings only under the name of "Timken" and at the same time to agree to relinquish use of the mark upon termination of the relationship with appellant. This restrictive arrangement is itself one of the means used to carry out the conspiracy and can hardly serve as a justification for other restrictive activities. Appellant's position in sub-

stance is that an agreement with a potential competitor preventing competition between it and the competitor, and providing that on termination of the agreement the competitor shall surrender the trade-mark it legally owns and has used for many years, is valid as ancillary to the licensing by appellant of the trade-mark which it does not own.

The anomalous result of appellant's contention, if accepted, is that British Timken, which in 1928 had common-law ownership of the mark in Great Britain (R. 609), and later became the registered owner there (Def. Ex. 87, R. 1988), was a "licensee" of its own mark. The argument becomes even more artificial as a result of appellant's action in October 1949, immediately after the relief hearings in the court below, when it took steps to become a "registered user" or "licensee" of the mark "Timken" in Great Britain, British Timken being the "registered owner" (*supra*, pp. 52–3). Appellant's contention leads to the ultimate conclusion that the registered owner of the mark is its "equitable licensee," while the "legal licensee" becomes the "equitable licensor." And the legal licensor is under a duty to supervise the quality of the product of appellant, the purported equitable licensor. Such legal legerdemain and attempted manipulation of trade-mark rights falls into a category aptly termed "hokus-pokus" in *California Fruit Growers Exchange v. Sunkist*

Packing Company, 166 F. 2d 971, 975 (C. A. 7).[98]

Appellant had complete control over the development and use of the name "Timken" at the time when its international use began in 1909. It could have prevented the rise of conflicting interests in, or the concurrent use of, the name at that time. Instead, it encouraged them, deeming the illegal restraint upon competition more to its interests. It would be strange doctrine indeed which would permit appellant now to continue to restrain trade in order to establish trade-mark rights which it has lost or failed to acquire because of its previous restraints of trade.

3. *The restraints were not in fact ancillary to the licensing of the name "Timken"*

Even if it be assumed, contrary to the arguments presented above, that appellant had the power to license the trade-mark in foreign countries, and that restraints of trade of the char-

[98] Appellant significantly does not mention its action, taken in 1949, whereby it arranged to become a "registered user" of the mark "Timken" in Great Britain, and thus subject under British law to British Timken's control of its production (*supra*, pp. 52–3). This action is utterly inconsistent with appellant's claim that, rather than being subject to British Timken control, it controlled British Timken's production, by supplying know-how, in compliance with British trade-mark law (Appellant's Br. 125). Appellant likewise omits any reference to the fact that trade-mark licensing was not known in Great Britain in 1928 when appellant supposedly began to comply with the requirements of the law relating thereto. Limited trade-mark "licensing" was first introduced by the Trade-Mark Act, 1938 (Govt. Ex. 8 (Decree), R. 2741, 2748; see R. 625–6).

acter here imposed are reasonable if ancillary to trade-mark licensing, the fact is that the restraints were not ancillary but were appellant's primary objective. The restraints were not the tail to the kite of trade-mark licensing; it was the other way round. On consideration of all the evidence the district court found as a fact that "the trade-mark provisions of the challenged contracts were subsidiary and secondary to the central purpose of allocating trade territories" (Fdg., par. 187, R. 1010). This Court will not try the question of intent *de novo. United States* v. *Yellow Cab Co.,* 338 U. S. 338.

In holding that the restraints imposed by the parties were not in fact ancillary to the "licensing" of the trade-mark the district court reviewed the history of the mark "Timken." The court noted that even as late as 1928[99] appellant had serious doubts of its ownership of the mark in the territories assigned to British Timken and French Timken (Fdg., par. 182, R. 1009). In some countries British Timken's predecessor was the owner of the mark and in France it had been registered by the predecessor of French Timken. A German national, Prausnitzer, owned the mark in that country. The court observed that it was apparent that appellant "could not use the mark in a great portion of the world (*ibid.*).

[99] As of January 1, 1928, appellant was the registered owner in only 34 countries and British Timken had no registered trade-mark rights anywhere in the world (Def. Ex. 87, R. 1972).

On the basis of appellant's inability to use the mark in most of the world, the court below concluded that appellant "was primarily concerned therefore, not in safeguarding the trade-mark rights which it then possessed, but rather in acquiring the rights obtained by other manufacturers, as a consequence of the early patent license agreements, in areas where * * * appellant had agreed not to manufacture and sell" (Fdg., par. 183, R. 1009–10). The court pointed out that from 1909 to 1924, appellant had been free of competition because of its patent monopoly, and that the evidence shows that the agreements were originally entered into for the "purpose of preventing competition in the sale of bearings" (Fdg., par. 188, R. 1011), and it rejected the attempt to extend the patent monopoly on the basis of the grant by it of trade-mark rights to British and French Timken (*ibid.*).

Thus, in final analysis, the ancillary defense fails, *inter alia,* for the fundamental reason that the restraints were not ancillary to the "licensing."

III

THE FINDINGS OF FACT UPON WHICH THE DISTRICT COURT BASED ITS JUDGMENT ARE CORRECT AND CLEARLY ARE SUPPORTED BY THE EVIDENCE

The findings of facts made by the trial court "represent the considered judgment of an able trial judge, after patient hearing" (cf. *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 341) and

are not to be set aside unless clearly erroneous (Fed. R. Civ. P., Rule 52 (a)). In this case, the Court is unquestionably being asked "to reweigh the evidence and review findings that are almost entirely concerned with imponderables, such as the intent of the parties to certain 1929 business transactions" (338 U. S. at 340).[100]

We submit that the findings of the district court are complete, accurate, and fully supported by the evidence. In view of the standards of review laid down in the *Yellow Cab* case, *supra*, and the prolixity of appellant's attacks upon the findings, it will suffice to confine discussion to the more important findings, and the evidence supporting them.

A. *The finding that appellant combined and conspired with potential or actual competitors*

Despite the fact that British Timken's predecessor, E&OA, did not begin the manufacture of bearings until 1909 (Appellant's Br. 140), the record is clear that appellant recognized E&OA as a potential competitor from the start. In the 1909 agreements, appellant exacted a covenant from E&OA not to manufacture or sell bearings outside the patent licensed territory. While these agreements gave E&OA the right to sell its bearings in its territory at any price it deemed desirable, they provided that the deficiency be-

[100] Here the transactions leading up to the conspiracy and bearing upon general intent go back to 1909.

tween the lowest price charged for the time being by the licensor to the trade in the United States, and the lowest price charged at the time by E&OA, should not exceed the United States tariff chargeable on bearings from any part of E&OA's territory (Def. Ex. 189, Art. 14, R. 2305, 2318; Def. Ex. 190, par. 37, R. 2322, 2335). These safeguards against competition indicate that appellant recognized E&OA as a potential competitor in the United States, and foresaw the possibility that third parties might buy E&OA's bearings and ship them into the United States.

The Vickers subsidiaries from 1909 to 1927, E&OA, Wolseley Motors and British Timken, are pictured by appellant (Appellant's Br. 140–1) as a series of unsuccessful companies with virtually no assets and little substantial progress. The facts show, however, that this was not the case. These subsidiaries were part of the powerful Vickers organization (R. 81–2, 231–2) so that appellant in dealing with them well knew that it was dealing with a company whose business was "world-wide-everywhere" (R. 231).

British Timken, from its inception in 1920, has experienced a rapid and substantial growth.[101] At

[101] In 1920 British Timken had only 350 or 400 employees engaged in the manufacture of tapered roller bearings and was making 60 or 70 sizes, largely automotive (R. 84). In 1927, however, British Timken was making 100 sizes of tapered roller bearings, mostly automotive sizes, and had a growing business in other fields, such as machine tools and mill equipment (R. 85). It was employing 500 people

the beginning of the conspiracy in 1928, British Timken had virtually all of the tapered roller bearing business in Great Britain (R. 107). Its only competitor was British Bock, Ltd. (R. 106), a small concern which was bought out shortly thereafter by British Timken (R. 144). In fact, British Timken controlled 99 or 100 per cent of the British tapered bearing market and was a dominant producer of tapered roller bearings in England as well as a strong potential competitor for appellant (R. 107). When one adds to this the fact that appellant was "many times over the largest manufacturer of tapered roller bearings in the world" (Gov. Ex. 1 (not printed); Ans., par. 11, R. 27), it readily appears that the district court

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(R. 85), and had produced as many as 660,000 bearings a year (Def. Ex. 31, p. 26, R. 1800, 1831).

The sales record of British Timken and its predecessors is equally impressive. In 1912 E&OA's net sales were £27,000 or $135,000; by 1919 they had reached £140,000 or $700,000 (Def. Ex. 230, R. 2545); in 1919 British Timken paid appellant royalties of $37,000, and in 1923 they were $62,000 (Def. Ex. 230, R. 2545). In fact, British Timken was growing at a more rapid rate than appellant. That much is apparent from a comparison of British Timken's net sales (Def. Ex. 230, R. 2545) with appellant's (Def. Ex. 229, R. 2544). British Timken's sales almost doubled in the six-year period preceding the commencement of the conspiracy while appellant's had increased only about 35 percent. Most impressive of all is the record of British Timken's profits in the five-year period immediately preceding the conspiracy agreements of 1928 (Def. Ex. 7, R. 1725). For example, in 1926, British Timken's net profit of $315,000 was more than 26 percent return on its gross sales, "a very good profit" (R. 241).

was fully justified in finding that "the accused agreements between 1928 and 1938 were made between two manufacturers, who on the basis of the evidence, were properly characterized as the largest manufacturer in the world and the largest manufacturer in Great Britain respectively" (Fdg., par. 36, R. 966).

Appellant also takes issue with the findings of the district court that French Timken was a "potential competitor" of appellant's in France (Appellant's Br. 143). The facts are these: A French anti-friction bearing manufacturer, SMG, had been making and selling tapered roller bearings, and in 1927–1928 was the *sole* producer in France (R. 111). SMG had been operating under an agreement with British Timken (Def. Ex. 194, pars. 3, 4, R. 2347–8) which was terminated in 1928 upon the organization of French Timken. The French company presently controls approximately 80 percent of the tapered bearing market in France (Fdg., par. 14, R. 961; R. 117). These facts fully support the conclusions of the district court that at the time of the formation of French Timken by appellant and Dewar, the French company was the largest dealer in tapered roller bearings in France (Fdg., par. 144, R. 1001–2) and a potential competitor of appellant (Fdg., par. 160, R. 1005).

Appellant further asserts that whether or not British Timken and French Timken were competitors of the American company is unimportant,

since it was impossible for these foreign companies to compete with appellant by importing bearings into the United States, and equally impossible for appellant to compete with them in their territories. (Appellant's Br. 143–4.) In the first place, this contention is at war with appellant's other argument that the covenants dividing the world between the three parties were reasonably and necessarily ancillary to the transfer of some property, in order to afford protection against competition for the recipient (Appellant's Br. 99 *et seq.*). Moreover, if competition between the parties was impossible, why did appellant enter into these agreements and why has it so vigorously defended its right to continue them? As the district court expressed it (Fdg., par. 204, R. 1015):

> If all the impediments to foreign trade existed ever since 1914, which became more and more pronounced to the present day, why were the contracting parties, defendant, British Timken and French Timken so concerned about air-tight agreements to keep each one within its own commercial domain? The repeated and persistent provisions of the successive contracts, for territorial restrictions, contradict any claim of lack of ability to compete.

The record abundantly supports the district court's finding that there was, and is, "actual and potential competition in the international roller bearing market" (Fdg., par. 206, R. 1015).

Indeed, on the basis of the evidence the district court concluded that had it not been for the restrictive agreements, "the volume of business with foreign countries would have been considerable in size" (Fdg., par. 208, R. 1017). But even if international trade in tapered bearings had not in fact existed and the conspirators could not have competed, their agreement to abstain from foreign commerce constitutes a violation of the antitrust laws. See *United States* v. *National Lead Co.,* 63 F. Supp. 513, 525–6, 530, affirmed, 332 U. S. 319.

B. *The findings as to competition between tapered roller bearings and antifriction bearings*

Appellant attacks findings by the district court on the grounds that they do not correctly set forth the extent of competition between tapered roller bearings and other types of antifriction bearings (Appellant's Br. 144). What appellant fails to appreciate is that the court below specifically found that there was some degree of competition between tapers and other antifriction bearings, and that, for certain purposes, tapers enjoyed freedom from competition (Fdg., par. 19, R. 962; Fdg., par. 130, R. 997–8). The court was not under the necessity of ascertaining with particularity the extent of this limited competition or freedom from competition. Tapered roller bearings obviously differ in some respects from other types of antifriction bearings and

the public is entitled to the benefits of competition within that segment of the industry. As was stated in *Eastman Kodak Co.* v. *Federal Trade Commission,* 158 F. 2d 592, 594 (C. A. 2), certiorari denied, 330 U. S. 828 (a monopoly case):

> Hence it will not do to say that all film is in the same class. If a purchaser wants a color film he must be able to buy it from more than one manufacturer if there is to be "free and open competition with commodities of the same general class"; that he can buy a black and white film will not serve to destroy the monopoly of the sole producer of color film.

And see *Fashion Originators' Guild* v. *Federal Trade Commission,* 114 F. 2d 80 (C. A. 2), affirmed, 312 U. S. 457.

Appellant also challenges findings that appellant and the co-conspirators dominated the tapered bearing markets of the world. Appellant is undeniably the largest manufacturer of tapered roller bearings in the world (Fdg., par. 10, R. 960; Gov. Ex. 1 (not printed); Ans., par. 11, R. 27). British Timken had 99 to 100 percent of the tapered bearing market in England in 1928 and now has about 95 percent (Fdg., par. 13, R. 961; R. 107). French Timken manufactures about 80 percent of the tapered bearings in France (Fdg., par. 14, R. 961; R. 117).

But the question of whether or not appellant and its co-conspirators dominate the tapered

roller bearing market has no significance in relation to the division of territories. This is not a monopoly case, and restraints of trade can be effected by others than the dominant member of an industry. The only possible significance of the dominant position of the parties is to aggravate the seriousness and results of offenses such as the exclusive exchange of know-how and the combination to suppress the competition of outsiders.

C. *The treatment of the three companies as separately operated units for purposes of determining that they had combined in violation of the Sherman Act, the treatment of evidence designed to indicate a "joint venture," and the finding that the relationship between the parties was merely a continuation of an illegal combination dating from 1909*

Objection is raised by appellant to the action of the district court in treating the three companies as separately operating units for the purposes of determining that they had combined in violation of the Sherman Act. Appellant concedes that the two foreign companies were separate and distinct corporate entities (Appellant's Br. 146) but vehemently denies that they were separately operating in the business of making tapered roller bearings.

It cannot be determined on what basis appellant claims that the co-conspirators were not separately operated. The record is uncontro-

verted, however, that British Timken and French Timken were managed and operated by Dewar and that, except for powers possessed by virtue of its stock ownership and agreements, appellant had no control over the immediate management of either foreign company (Fdg., par. 42, R. 967; Fdg., par. 44, R. 968; Fdg., par. 54, R. 969; Fdg., par. 156, R. 1004; Def. Ex. 15, par. 2, R. 1730; Def. Ex. 69, R. 1954; Def. Ex. 186, R. 2298; 912–3, 915).

If there were ever any doubts as to the separate and distinct operation of the foreign companies, these doubts were dispelled in 1934 when British Timken became a "public" company. Dewar in speaking of the 1934 "new deal" referred to the "very separate and distinct identities of the various Companies concerned", and said that "no one Company has the right to expect any material benefit from another Company without properly paying for it" (Gov. Ex. 176, R. 1690). As Dewar expressed it, "'Me' is British Timken" (Fdg., par. 158, R. 1005; R. 277). This is not to say that appellant's minority interest in British Timken is unimportant. Obviously that interest is substantial and places appellant in a position to exert powerful influence against any latent tendency of British Timken to enter into competition with appellant. But such a minority interest in a potential competitor does not legalize the combination between competitors.

Even if there had been complete control by appellant over British Timken and French Timken so as to create a financial integration or parent-subsidiary relation, these relationships would not serve to insulate the parties from the operation of the antitrust laws. *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 227; *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211.

Appellant raises objections at several points (Appellant's Br. 57, 146–148) to the alleged failure of the district court to make detailed findings as to the complex financial interrelationships between the parties, indicating the existence of a so-called "joint venture". These financial arrangements were merely subordinate and supplementary agreements, one of the purposes of which was to place control of British Timken and French Timken in Dewar. The fact that the court, in its extended discussion of the "joint venture" defense, made specific findings (Fdg., par. 157, R. 1004–5; Fdg., par. 158, R. 1005; Fdg., par. 159, R. 1005) as to Dewar's control over the foreign companies, is a definite indication that the court considered, and did not disregard, evidence of such financial arrangements. In fact, counsel for appellant has admitted that the court, in reaching its decision, considered evidence offered by appellant in support of its defenses. Counsel said, at the hearing on findings and conclusions (p. 11):

> We have assumed from the opinion of the Court and a very careful reading and re-reading of it, that the Court did receive and *did consider, in coming to the conclusions the Court reached, the evidence offered by defendant in support of what have been termed our various defenses.* [Emphasis added.]

The action of the district court in rejecting the "joint venture" theory and finding that the 1928 agreements "merely extended the restrictive arrangements which had existed for almost twenty years between potential competitors" (Fdg., par. 153, R. 1003–4; Fdg., par. 155, R. 1004), is fully supported by the evidence.

The record is clear that Dewar's underlying motive for making the 1928 agreements was his desire to escape appellant's competition and to continue the existing arrangements. In March 1927, Dewar knew that the agreements had only about eighteen months to run (R. 239) and that if they were not renewed he might have to face appellant's competition (Def. Ex. 88, par. 4, R. 1991, 1192–3; Def. Ex. 194, par. 5, R. 2347, 2349). Consequently one of the first things he considered upon being made chairman of British Timken was (as he wrote to appellant) "the question of the continuation of our existing agreement" (Def. Ex. 4, R. 1722, 1723). This continuation of these agreements, which is actually what the 1928 agreements are, was the primary concern

of Dewar before the so-called "joint venture" was even mentioned, and it was of concern regardless of whether appellant made any investment in British Timken. Even the "Heads of Agreement" speaks of "extending for ten years the terms of the existing agreements" subject to certain modifications (Def. Ex. 15, par. 10, R. 1730, 1733-4).

The evidence also points to the inevitable conclusion that appellant was well aware that Dewar was acting in order to escape appellant's competition. Appellant had been advised by its London attorney that one "main advantage derived by the English company under the agreement" was "the absence of your competition" (Gov. Ex. 174, R. 1686). Similarly, in connection with the previous agreements, appellant had been advised by its own trade-mark attorney that one of the great values to British Timken was the absence of appellant's competition (Gov. Ex. 173, R. 1683). Appellant's vice president himself admitted that one of the purposes of the agreements was to satisfy Dewar in his desire not to have appellant's competition in the areas allocated to the British company (R. 932-4).

The record very plainly shows that at the expiration of the basic patents in 1924, the parties began to cast about for other devices to support the division of territory between appellant and British Timken. An attempt was thereupon

made to employ the trade-mark device.[102] In short, it is there demonstrated that in 1921, as well as 1927, appellant was well aware and had been advised that it had no rights in the name "Timken" in the United Kingdom which it could have licensed to British Timken, so that the intent was not to protect any trade-mark rights but to continue the allocation of territories.

D. *The findings that appellant and its co-conspirators had combined and conspired to suppress the competition of outsiders by acting collectively against outsiders or joining with them*

Appellant raises more than a dozen objections (Appellant's Br. 153–161) to the district court's findings relating to the combination to suppress or eliminate the competition of outside producers of antifriction bearings. It would unnecessarily prolong this brief to answer those objections in detail; a few examples will be cited, however, to show their lack of substance.

As appellant recites (Appellant's Br. 153), the district court found that the parties had adhered to their contractual obligations to maintain exclusive territories (Fdg., par. 70, R. 972) and that each of them had refused orders for shipment outside its territory, referring them to the company in whose territory they were to be used

[102] The subsequent manipulation of trade-mark rights is fully discussed in notes 31 and 32, and text relating thereto, at *supra*, pp. 24–25.

(Fdg., par. 71, R. 973). Appellant points to one instance of referral of orders, and asserts that "This, of course, was in accordance with the basic policy of the joint enterprise" (Appellant's Br. 153). Appellant completely ignores Finding, par. 71 (R. 973) which indicates the large number of orders and inquiries referred by the parties to each other. The evidence showed (Gov. Exs. 139–147A, R. 1579–1636; R. 218–9) and the district court found (Fdg., par. 71, R. 973), that during the period from July 1, 1945, to February 20, 1947, alone, appellant transmitted 402 inquiries or orders to British Timken and French Timken, advising those customers that either the British or French company had the exclusive right to supply the bearings in that territory.

Objection also is raised by appellant as to the district court's findings that provisions of the agreements fixing prices on sales to Russia were carried out to the letter (Fdg., par. 94, R. 986). The claim is made by appellant that this statement is contrary to the only evidence in the record which is, in substance, that this provision was inserted in the agreements to prevent the Russian buying agencies from playing off one company against the other, but that in fact, those agencies never sought quotations from appellant and British Timken on the same business at the same time (Appellant's Br. 155). Here again, appellant has ignored testimony which clearly

supports the district court's finding. Appellant has not referred to the admission of Mr. Moore, appellant's Director of Sales, that the parties had in actual practice kept each other advised of their negotiations for Russian business (R. 897–8). Appellant likewise has overlooked the testimony of its president that in general appellant could not undercut British Timken on sales to Russia, and that appellant and British Timken gave their prices to each other (R. 554).

Still other objections are raised to findings relating to the foreign cartel arrangements entered into by British Timken and French Timken with competitors abroad which the district court found had restricted exports by American producers (Fdg., par. 117, R. 994). Appellant states that the district court found that it [appellant] was not a party to the English and French agreements (Appellant's Br. 159). The court did so find, but in addition it concluded that while appellant was not actually a party to the arrangements, it had cooperated and consulted with the co-conspirators in bringing them about, and had approved the agreements before they were executed, all as a part of the general plan to suppress the competition of outside producers (Fdgs., pars. 110, 111, 125, R. 992, 996). These findings have ample support in evidence (Gov. Exs. 49–65, 65A, 68, 70, R. 1396–1438, 1438, 1445, 1453; R. 543–4).

E. *The evidence of price fixing*

Appellant contends the record is clear that the provisions of the contracts for fixing prices for replacement bearings sold in each other's territory had "never been followed by the parties since the first agreement was made in 1928" (Appellant's Br. 87). The record does not support this contention. As early as 1928 the parties were fixing prices on replacement bearings (*supra*, pp. 35–36). In practice, after 1935, the parties agreed to a general formula for fixing prices on replacement sales in each other's territory, rather than seeking a price from the other at the time of making each sale. This device was known as the "protective discount" (*supra*, pp. 43–44).

This fixing of abnormally high export prices caused appellant to lose much business, since this "weakness in our pricing policy" caused buyers to become "familiar with the fact that" (Gov. Ex. 131, R. 1545): "we are protecting British Timkin and by so doing, do not have a price that is anywhere near competitive with Bower. As a result, it now develops that we don't even get inquiries for a lot of requirements. They are automatically referred to our competitors." Despite this, appellant continued to adhere to price arrangements even though in some instances it did not agree with British Timken's pricing policies (Gov. Ex. 128, R. 1541).

During World War II when appellant made sales in British Timken's territory at the latter's request, British Timken instructed appellant as to the price to be charged (Gov. Ex. 102, R. 1418; Gov. Ex. 103, R. 1484; Gov. Ex. 112, R. 1511; Gov. Ex. 113, R. 1514; Gov. Ex. 129, R. 1542). The arrangement for Australia was that British Timken would fix prices at which appellant sold bearings in that area (Gov. Ex. 114, p. 4, R. 1521; R. 187, 188), and later when appellant took over all of British Timken's territory, the "protective discount" would be quoted on *all* unsolicited inquiries, unless the order was a large one of special importance (Gov. Ex. 128, R. 1541). Even then, appellant had to communicate with British Timken's agents (Gov. Ex. 128, R. 1541) who would determine prices to be charged in accordance with British Timken's instructions for the handling of such business (Gov. Ex. 125, R. 1534; Gov. Ex. 127, R. 1538).

F. *The district court properly adopted its memorandum opinion as its findings of fact and conclusions of law*

Appellant argues that the district court erred in failing to make proper findings of fact, separately found, and conclusions of law, separately stated, as required by Rule 52 of the Rules of Civil Procedure.

Rule 52 (a) provides in part that, "In all actions upon the facts without a jury * * *,

the court shall find the facts specially and state separately its conclusions of law thereon * * *." By amendment effective March 19, 1948, the following language was added: "If an opinion of memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

It is clear from the *Report of the Advisory Committee on Rules for Civil Procedure,* H. Doc. No. 473, 80th Cong., 1st Sess. pp. 111-112, that this amendment was adopted expressly to permit a district court to certify its memorandum opinion as its findings of fact and conclusions of law. Appellant does not appear to be attacking the legality of the procedure whereby the district court, in the instant case, so certified its memorandum opinion.[103]

The first objection raised by appellant is that the memorandum opinion does not contain "underlying and subsidiary findings on several important matters which are essential to a determination of 'all the issues in the case.'" (Appellant's Br. 163.) The complete answer to this contention is that the trial court was not required to make findings on all the facts in the case. It was required to find only such ultimate facts as were necessary to reach a decision in the case. *Skelly Oil Company* v. *Holloway,* 171

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[103] But see cases cited by appellant (Appellant's Br. 163) in support of its attack on the findings. Each of these five cases was decided prior to the amendment to Rule 52 (a).

F. 2d 670, 673 (C. A. 8); *Oedekerk* v. *Muncie Gear Works, Inc.*, 179 F. 2d 821 (C. A. 7); *Norwick Union Indemnity Company* v. *Haas*, 179 F. 2d 827, 832 (C. A. 7); *Klimkiewicz* v. *Westminster Deposit & Trust Company*, 122 F. 2d 957, 958 (C. A. D. C.). As stated in the *Report of Advisory Committee on Rules for Civil Procedure, supra* (p. 112), "the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for overelaboration of detail or particularization of facts."

The second objection voiced by appellant is that the memorandum contains much "discussion of, and quotation from, portions of the evidence as to various matters, and the court's reasoning with respect thereto." (Appellant's Br. 164.) The Court's references to evidence and reasoning as to such evidence can hardly be harmful to appellant on this appeal. If anything, such references and reasoning will aid this Court in its review of the case by showing the basis for the district court's findings and indicating the reasoning process employed by the court in reaching its conclusions.

The third objection of appellant is that the statements of fact and conclusions of law "are not stated separately in many instances but must be gleaned from an examination of its entire 60 pages" (Appellant's Br., 164). Reference need only be made to the memorandum opinion itself

in answer to this contention. The lengthy opinion fairly bristles with clear and specific findings of fact and conclusions of law, separately stated. It contains abundantly adequate findings of ultimate facts necessary for a proper adjudication of all pertinent issues, and legal conclusions pertinent to the issues presented.

IV

THE RELIEF ORDERED BY THE DISTRICT COURT IS APPROPRIATE AND NECESSARY

A. *The district court properly directed divestiture of appellant's financial interests in its co-conspirators, British Timken and French Timken*

Subsection A of Section VIII of the judgment requires appellant to divest itself of "all stock holdings and other financial interests" in British Timken and French Timken within two years of the date of judgment, and to submit for the court's approval a plan for such divestiture within one year from such date (R. 1179).

At the time of judgment appellant's financial interests in these co-conspirators consisted primarily of 30¼% of the common stock of British Timken and 50% of the stock of French Timken.[104] These interests in companies which were and

[104] Appellant also owned 1% of the preferred stock of British Timken and certain promissory notes of French Timken (*supra*). Subsequent to the entry of judgment appellant acquired certain additional shares of British Timken and French Timpen stock (*supra*).

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are appellant's "potential competitors" (*supra*, pp. 27, 117–121) were acquired as an integral part of the 1927–1928 agreements made by appellant to continue to allocate world markets among it and its co-conspirators and otherwise illegally to restrain competition (*supra*, pp. 28–32).[105] The district court found that the 1927 agreements "were made to carry on effectively the combination to eliminate competition between the parties and to frustrate any competition of outsiders" (Fdg., par. 154, R. 1004).

The "Heads of Agreement" of May 16, 1927 (Def. Ex. 15, R. 1730), provided for purchase of stock in British Timken and French Timken by appellant and Dewar and for extension of the existing restraints "in connection therewith" (Fdg., pars. 42–44, R. 967–8; *supra*, p. 31). The pattern for these restraints was set by the 1909 agreements dividing world markets and eliminating competition (Fdgs., pars. 120, 153, R. 995, 1003–4). These agreements for division of territories and other restraints, as embodied in

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[105] Pursuant to these ~~requirements~~ agreements, appellant acquired all of the French Timken stock which it held at the time of judgment (*supra*, pp. 30, 36), as well as most of its stock holdings in British Timken (*supra*, pp. 31, 32). In 1935, when appellant and Dewar sold part of their stock in British Timken on the open market and entered into a series of new agreements designed "to continue the implementation of the earlier contract" (R. 283, 914), appellant repurchased on the open market part of the stock thus sold, the net effect of its sales and repurchases being to reduce its share of British Timken common stock to 30¼% (*supra*, p. 39).

and extended by later agreements between appellant and British Timken, were to expire on January 1, 1929 (Fdg., par 37, R. 966; *supra,* pp. 26, 28). The district court found that appellant's association with Dewar in acquiring an interest in British Timken and French Timken was "formed for the purpose of continuing a combination to allocate exclusive sales territories in the world, to fix prices and to eliminate competition both within and without the combination" (Fdg., par. 163, R. 1006). Thus the stock acquisitions, both in purpose and effect, served to effectuate and solidify the underlying conspiracy to restrain trade in antifriction bearings in all markets of the world.

Appellant, in view of its "joint venture" argument, can scarcely deny that its acquisition of British Timken and French Timken stock was directly linked with its trade-restraining agreements with these companies. The basic premise of the "joint venture" argument is that these agreements were not merely linked with, but (were actually subordinate and ancillary to) ~~Timken and French Timken (*supra*, pp. 31-2),~~ appellant's acquisition of a large stock interest in its co-conspirators.

While the 1927 agreements provided that Dewar should control the management of British Timken and French Timken (*supra,* pp. 31–2), appellant was entitled to representation on their board of directors (Def. Ex. 15, par. 7, R. 1732–3; R. 1035). Appellant's ownership interest in these foreign companies thus put it in a position

to exert a powerful voice in opposition to any move on their part to put an end to the cartel system which had been set up. No occasion for exercising this power arose, but appellant threw its influence in favor of continuing the illegal restrictions when the agreements were renewed in [redacted] 1935 and 1938 (*supra,* pp. 38–41). Appellant has itself argued that, had it not done so, it would have been using its own money "to create competition for itself" (R. 1165–6).

Both appellant and Dewar recognized, in 1927 and later, that appellant's financial interests in British Timken and French Timken provide assurance against competition between it and its co-conspirators. Dewar, being anxious to avoid appellant's prospective competition with British Timken upon expiration on January 1, 1929, of the existing trade-restraining agreements (Fdg., par. 135, R. 1005), insisted upon a territorial understanding (Fdg., par. 207, R. 1015–7; R. 933), and sought to insure this result by having appellant purchase part of the British Timken stock so that it would have an "interest then in the profitable operation of the company" (*supra,* p. 30). Appellant's Vice President testified that, in view of its financial investments, allocation of territories was "only normal" (R. 933). These investments, furnishing both motive and means for preventing competition between appellant and the companies in which it

has invested, will remain a constant and powerful deterrent to competition as long as they are permitted to continue.

We submit that there could hardly be a clearer case of illegal acquisition than one where, as here, stock in potential competitors was acquired as an integral part of a conspiracy between the acquired and acquiring companies to restrain trade in a manner forbidden by the Sherman Act. Not only were the stock acquisitions an essential element of the conspiracy itself, but they put behind the scheme to control world trade, in addition to the ties forged by consipracy and agreement, the force of a large ownership interest in putative competitors by the dominant concern in the industry.

We have shown that appellant's interests in British Timken and French Timken (1) were acquired pursuant to and in furtherance of an illegal conspiracy, (2) were used to promote the conspiracy's illegal ends, and (3), if not severed, will continue to serve as an inducement to maintenance of the non-competitive regime of the past. Each of these circumstances, singly considered, constitutes ground for divestiture.[108] *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 152–153. Taken together, they furnish the most compelling justification for the divestiture ordered by the district court.

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[108] In the district court the Government urged each of these circumstances as grounds for divestiture (R. 1165–1168).

In the *Paramount* case, certain exhibitor-defendants held stock interests in corporations operating motion picture theatres, other stock interests in the same corporations being held in some cases by other exhibitor-defendants and in other cases by independents, i. e., former, present, or putative motion picture operators not controlled by defendant exhibitors. In that case the district court had found that the result of joint ownership was that the jointly-owned theatres were operated "collectively rather than competitively," and it had ordered termination of all joint ownerships. This Court, after approving the divestiture which had been ordered of theatres jointly owned by defendant-exhibitors, held that the divestiture of theatres jointly owned with an independent should be in some respects broader and in some respects narrower than that decreed by the district court.[107] This Court laid down the principles to govern divestiture of these theatre interests as follows (334 U. S. at pp. 152–153):

[107] The district court's judgment permitted the defendant-exhibitor to acquire, subject to certain limitations, the existing interests of the independent, whereas this Court held that no such permission should be granted. On the other hand, the district court had ordered divestiture in the case of theatres owned jointly with persons assumed, without inquiry, to come within the classification of an independent, whereas this Court held that divestiture was not appropriate in the case of theatres involving "no more than innocent investments by those who are not actual or potential [theatre] operators."

To the extent that these acquisitions were the fruits of monopolistic practices or restraints of trade, they should be divested. * * * Moreover, even if lawfully acquired, they may have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy. In that event divestiture would likewise be justified. * * *

Furthermore, if the joint ownership is an alliance with one who is or would be an operator but for the joint ownership, divorce should be decreed even though the affiliation was innocently acquired. For that joint ownership would afford opportunity to perpetuate the effects of the restraints of trade which the exhibitor-defendants have inflicted on the industry.

In *United States* v. *Crescent Amusement Company*, 323 U. S. 173, companies which were potential competitors in the operation of theatres had become affiliated in the course of a conspiracy to restrain and monopolize trade and commerce in motion picture films, in violation of the Sherman Act. The district court had entered a judgment which required each corporate defendant to divest itself of any interest in any other corporate defendant or affiliated corporation. This Court held that the principle that those who violate the Sherman Act may not reap the benefits of their violations justified divestiture of

all interest in affiliates whose acquisition was "part of the fruits of the conspiracy." But this Court significantly further held (pp. 189–190):

> But the relief need not, and under these facts should not, be so restricted. The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in combination against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future. Hence we do not think the District Court abused its discretion in failing to limit the relief to an injunction against future violations. There is no reason why the protection of the public interest should depend solely on that somewhat cumbersome procedure when another effective one is available.

United States v. *National Lead Company*, 332 U. S. 319, like the present case, involved an illegal division of world territories. This Court upheld the district court's order that defendant divest itself of its foreign stock interests because "the stock acquisitions were part and parcel of the

territorial allocation agreements" (332 U. S. at 363).

Since appellant acquired its British Timken and French Timken stock as part and parcel of an illegal conspiracy, since it had utilized such investment to further this conspiracy, and since the investment would continue to provide opportunity and inducement to joint action to suppress competition, the district court's order of divestiture clearly did not constitute an abuse of the discretion vested in it respecting the framing of appropriate relief against the violations of the Act which it had found and against future violation of the Act.

The district court had a wide range of discretion in fashioning relief, and where its findings of violation are sustained, only abuse of discretion by the district court will lead this Court to recast its judgment. *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 185; *United States* v. *National Lead Co.,* 332 U. S. 319, 334. In view of the appellant's long and undeviating adherence to a cartel system, the district court plainly was justified in concluding that relief limited to mere prohibition of consensual agreements in restraint of trade would be ineffective to undo the effects of the past illegal conduct. The district court was warranted in concluding that if the judgment is to establish conditions conducive to competition in international trade among the erstwhile conspirators, appellant's

ownership interest in its co-conspirators must be severed so that the foreign companies will be completely independent of appellant *de facto* as well as *de jure*.

Appellant contends (Appellant's Br. 22–28, 196–198) that the nature of the business in which it is engaged, together with the obstacles to international trade created by tariffs, quota restrictions, governmental limitations on foreign exchange, etc., are such as to foreclose any substantial invasion of foreign markets by appellant or of domestic markets by its co-conspirators. Appellant concludes that this Court should make the assumption that there will be no competition between appellant and its co-conspirators even if the ties binding them to appellant are severed, and that the Court should hold that, in these circumstances, divestiture operates as a penalty rather than as a measure of relief against past and future violations of the Act.

The district court, dealing with appellant's contention that the exports of antifriction bearings from the United States, and imports into the United States, are so insignificant that action by the court to curb restraints on such trade would be a vain and futile gesture, pertinently observed (Op., par. 204, R. 1015):

> If all the impediments to foreign trade existed ever since 1914, which became more and more pronounced to the present day, why were the contracting parties, defend-

> ant, British Timken and French Timken so concerned about airtight agreements to keep each one within its own commercial domain? The repeated and persistent provisions of the successive contracts, for territorial restrictions, contradict any claim of lack of ability to compete.

The district court found that there had, in fact, been "actual and potential competition" in international trade in roller bearings, and that such trade would have been of considerable size but for the restrictive agreements (*supra*, p. 121). Not only is the asserted unlikelihood of any substantial international trade in tapered roller bearings open to serious doubt, but it rests on an inherently speculative forecast as to the factors governing the future course of international trade. The district court properly held that the applicability of the Sherman Act to foreign trade cannot be made dependent upon every fluctuation in international political and economic conditions (Concl., par. 209, R. 1017). And even if any doubt existed as to efficacy of the relief deemed necessary to prevent further violations of the Act, relief is not to be withheld because of possible uncertainty as to how successful it will be in achieving the desired end. Just as in determining the scope of the relief to be granted, "doubts should be resolved in favor of the Government and against the conspirators" (*Local 167 v. United States*, 291 U. S. 293, 299), doubts

as to the efficacy of relief should be resolved in favor of the Government and against those who over a long period have been flagrant violators of the law.

Appellants suggest (Appellant's Br. 198–199) that the provisions of the judgment may have the effect of preventing appellant from using the trade-mark "Timken" in countries where British Timken or French Timken have been prior users of the mark. But even if we assume this to be true, it does not follow that appellant will not be able to compete, by selling its products in such countries under another trade-mark. To do so might well lead to greater competition than if all sold under the same trade-mark.

Appellant also urges (Appellant's Br. 199–202) that divestiture should be denied because it may have the effect of preventing appellant from realizing on the full value of its investment in its co-conspirators. But it is well settled that those who violate the Act "may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience" (*United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189), and that "the policy of the antitrust laws is not qualified or conditioned by" the disadvantages or inconvenience which the judgment provisions may cause to those whose conduct is regulated (*United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 159).

Furthermore, the hardship of divestiture to appellant is doubtful and speculative. The testimony shows that there is a regular market for British Timken shares, which are listed on the London Stock Exchange and also traded upon the so-called "switch pound" market in New York (R. 1111). Appellant has a two-year period in which to dispose of this stock and may do so through open market sales, privately negotiated sales, syndicate operations, or any combination of these methods.

It is not clear that appellant has raised, or that it is entited to raise, any issue regarding subsection B of Section VIII of the judgment, which enjoins appellant from further acquisitions of British Timken and French Timken stock (R. 1179).[108] Regardless of whether the issue is properly raised, the provision is clearly necessary to prevent appellant from nullifying, by additional stock purchases, the divestiture which is ordered by subsection A. In the *Paramount* case, *supra*, this Court, in approving termination of theatre interests as to which the defendant-exhibitors were joint owners with potentially competitive independent operators, held that it was improper for the district

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[108] There is a reference to this requirement of the judgment in appellant's Summary of Argument (Appellant's Br. 80) and a passing reference to it in the Argument (Appellant's Br. 98), although not in connection with divestiture, and it is not covered by appellant's Statement of Points to be Relied Upon (R. 1327-32).

court to permit termination of such interest through acquisition of the independent's interest (334 U. S. at pp. 152–153).

B. *The injunctive provisions of the judgment are appropriate means for preventing further violation of the Act*

The injunctive provisions of the judgment to which appellant objects principally prohibit concerted action and practices which were found to constitute elements of the illegal conspiracy to which appellant was a party. And to the extent that the prohibitions go beyond activities found to be unlawful, they come within the principle that "relief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *U. S. Gypsum Company,* 340 U. S. 76, 90.[109]

1. *Exclusive grant, receipt or exchange of patent licenses, know-how and material and machinery.*—Appellant objects (Appellant's Br. 165–170) to the provisions of the judgment which enjoin it from entering into any conspiracy, agreement, or understanding with British Timken or French Timken for the exclusive grant, receipt or interchange of patent licenses, know-

[109] See also *International Salt Co.* v. *United States,* 332 U. S. 392, 400; *Local 167* v. *United States,* 291 U. S. 293, 299; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461; *United States* v. *Bausch & Lomb Co.,* 321 U. S. 707, 727; *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409.

how, or machinery and material relating to anti-friction bearings.[110]

The district court found that, although it does not "convincingly appear" that the exclusive exchange of know-how or enforcement of the trade-mark restrictions alone had served as "direct instruments" to eliminate competition, "they have been most helpful in buttressing other illegal conduct to achieve the desired result" and "were integral parts of the general scheme to suppress trade" (Fdg., par. 137, R. 1000). Means thus employed in effectuating the conspiracy were properly barred by the judgment. Indeed, when a trial court has made a finding of a conspiracy in restraint of trade, the prohibitions of its judgment need not be confined to "the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal." *United States* v. *U. S. Gypsum Co.,* 340 U. S. 76, 88-89.

It is immaterial that the complaint did not charge that there had been an exclusive exchange of know-how and of patented and unpatented inventions. Evidence to establish such a claim was presented at the trial (Fdg., par. 137, R. 1000) and issues with reference thereto were argued by the parties (Fdg., par. 164, R. 1006). "When issues not raised by the pleadings are tried by the express or implied consent of the

[110] Subsections G, H, Section V, and subsections A, B, C, 7, 8, Section VII, quoted *supra*, pp. 11-13.

parties, they should be treated in all respects as if they had been raised in the pleadings," and failure to amend the pleadings to conform to the evidence "does not affect the result of the trial of these issues." Federal Rules of Civil Procedure, Rule 15 (b).

Hartford-Empire Co. v. *United States,* 323 U. S. 386; *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U. S. 212; and *United States* v. *National Lead Co.,* 332 U. S. 319, cited by appellant, clearly are not apposite. The *Hartford-Empire* case merely held that, in the absence of a showing of patent invalidity, it was improper to require dedication to the public of patents employed in carrying out illegal restraints of trade. The *De Beers* case merely condemns grant of a preliminary injunction with respect to a matter wholly outside the issues of the case. And the holding in the *National Lead* case was that there was no basis for requiring divestiture of certain plants where there had been no charge, proof, or finding that the plants in question had been acquired or used in violation of the Act.

Appellant also contends that the prohibition against exclusive grant, receipt, or exchange of know-how and certain other property is confiscatory. We submit that this contention is almost frivolous. The prohibition is no more confiscatory than the prohibition against sale or lease of goods on tying clauses or conditions,

outlawed by Section 3 of the Clayton Act. It is a limitation, not a destruction, of property rights. In the *Hartford-Empire* and *National Lead* cases there is some suggestion that a requirement of compulsory licensing royalty-free offends against the due process clause of the Fifth Amendment, but this was on the theory that such a requirement is a destruction of all property rights in the defendants' misused patents.

2. *Agreements to fix sale or resale price.*—Subsection F of Section V of the judgment (*supra*, p. 10) enjoins appellant from agreeing with British Timken or French Timken, or any subsidiary, agent or distributor thereof, to fix or maintain sale or resale price. Appellant contends (Br. 170–173) that this prohibition might deny to it "rights" which it would otherwise have under the Miller-Tydings Act.

Agreements of this kind with British Timken or French Timken are horizontal agreements, not within exemptions from the Sherman Act given by the Miller-Tydings Act. Appellant's objection is therefore limited to the possibility that one of the foreign companies might have a distributor in this country who was also a distributor for appellant. But if appellant sold generally in this country to distributors pursuant to agreements having sanction under the Miller-Tydings Act, it is not clear that the judgment would bar such agreement with a distributor who

also happened to handle products of British Timken. Certainly the applicability of the prohibition might depend upon all the circumstances involved, including the relationship of the distributor to appellant and to the foreign company. If the situation suggested should ever arise, appellant would be free to apply to the district court for an interpretation of the scope of the prohibition of the judgment or for modification of the prohibition if good cause therefor could be shown. See *International Salt Co.* v. *United States*, 332 U. S. 392, 401.

3. *Refusing to sell or selling at discriminatory prices, on products to be resold in British or French territory.*—Subsection B of Section VI of the judgment (*supra*, pp. 10–11) enjoins appellant from refusing to sell bearings to any person at prices and on terms corresponding to those regularly offered to customers in its own territory, where the reason for such refusal is that such bearings are to be resold in territories exclusively allocated to British Timken and French Timken by the 1938 agreements.

Section IX of the judgment (*supra*, p. 14) similarly prohibits sales at discriminatory prices, and failure to provide comparable service and assistance to distributors, on sales in those territories.

For more than forty years appellant has refrained from sales in the countries allocated to its co-conspirators. Appellant and its co-conspirators have "religiously adhered to their

contractual obligations to make the territorial divisions inviolate" (Fdg., par. 70, R. 972). The "inflexible territorial limitations" which they imposed were "designed for the purpose of preventing competition" (Fdg., par. 124, R. 996) and have "had the effect of eliminating competition" (Fdg., par. 129, R. 997). In these circumstances, a mere injunction prohibiting appellant from conspiring[5] to divide territories would plainly be insufficient to restore competition to the industry.

Appellant urges that the prohibitions are too broad, and suggests (Appellant's Br. 173) that they would apply to a refusal to sell, for motives of patriotism, in a territory in which appellant's bearings might come into the hands of Communists infiltrating the region. But questions of this character concern national policy and foreign relations and are to be determined by the appropriate officials of the Federal Government, not by private individuals or corporations.

Appellant objects (Br. 175–178), on the ground of unnecessary expense and burden, to the prohibition against failure to furnish to foreign distributors service and assistance comparable to that given domestic distributors. But service may be as important as price in selling appellant's product. The record is clear that mechanical engineering plays a pivotal role in the sale of bearings for original installation. In the words of appellant's vice president, it is at

the point where the layouts are prepared, when the proposed machinery is on the drawing board of the customer, that competition for original installation business takes place (R. 43-4, 65).

Appellant maintains local sales offices in cities throughout the United States, to each of which is attached a corps of sales engineers. These engineers confer with design engineers at the customer's offices and attempt to place appellant's bearings in the machinery to be manufactured by the customer. The customer in turn calls on appellant for design applications (R. 948). A similar sales engineer organization is maintained by appellant in South America (Gov. Ex. 141, R. 1582) and British Timken and French Timken provide the same type of technical assistance to customers in their respective territories (R. 391). Appellant has admitted that, for it to conduct any satisfactory sales efforts in the markets served previously by British Timken and French Timken, it would be necessary to have independent sales organizations, engineer organizations and replacement organizations (R. 544). Appellant's president has pointed out that "bearings are rarely sold by correspondence or by mail order methods" (R. 545). These facts indicate both the need for and the reasonableness of the provisions of the court's judgment. Of course comparable service is, in some measure, related to the volume of actual or potential business.

Even if it be assumed that the judgment would tend to force appellant "to enter into business relations," it is clear that the requirement would not be beyond the jurisdiction of the district court. *International Salt Co.* v. *United States*, 332 U. S. 392, affirmed an injunction requiring defendants to lease salt-dispensing machinery to all applicants without discrimination, and the Court said in this connection that the purpose of a judgment entered against those who have violated the Sherman Act is not "merely to end specific illegal practices," but in addition to effectively "pry open to competition a market that has been closed by defendants' illegal restraints" (332 U. S. at p. 401).

Appellant's related contention that the judgment deprives it of the right to choose its customers is met not only by the decision in *International Salt*, but also by decisions upholding judgments which require granting patent licenses, at a reasonable rate of royalty, to every applicant therefor. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 417–8; *United States* v. *National Lead Co.*, 332 U. S. 319, 330, 332, 364; *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 94.

4. *Agreements with co-conspirators as to transfer of trade-mark.*—Subsection C, 1, 2, 4, 5, of Section VII of the judgment (*supra*, p. 12) enjoins appellant from entering into agreements or contracts with its co-conspirators for the transfer of any right or immunity under a trade-

mark or name, upon certain specified conditions which involve limitation of competition, restraint of trade or price fixing.

The district court found that the enforcement of trade-mark restrictions by appellant and its co-conspirators had served to buttress the desired result of eliminating competition among themselves and had been "integral parts of the general scheme to suppress trade" (Fdg., par. 137, R. 1000); that the trade-mark provisions of their agreements "were subsidiary and secondary to the central purpose of allocating trade territories" (Fdg., par. 187, R. 1010); and that appellant's agreements with its co-conspirators governing use of the trade-mark "Timken" was "for the purpose of preventing competition in the sale of bearings," and not to protect itself or the public from deceit (Fdg., par. 188, R. 1010–11).

Based upon such findings, the district court enjoined the use of trade-marks for allocation of territory and like purposes. The basic prohibitions of the judgment against such practices would be ineffective without this trade-mark relief since otherwise trade-mark rights might be employed to divide trade on a territorial basis. To the extent that this relief bars conduct which is lawful standing by itself, such prohibition is proper and appropriate where, as here, it is required in order that the relief be effective. *Local 167* v. *United States,* 291 U. S. 293, 299;

Hartford-Empire Co. v. *United States,* 323 U. S. 386, 409.

Appellant's purpose to continue the allocation of territory is shown by what transpired at the London conference immediately following the hearing on relief in the district court, when it was arranged that appellant become the "registered user" and British Timken the "registered owner" of the mark "Timken" in certain countries within British Timken territory (Def. Ex. D, R. 2757–61). Significantly, it was decided that appellant's rights as a "registered user" in certain territories would be limited by the allocation of territories in the 1938 agreements (Def. Ex. D (Decree), par. (M), R. 2762), so that even though appellant is a "registered user" in Great Britain, for example, it would not be empowered under this agreement to make or sell bearings there for original installation because prohibited from so doing by the 1938 agreements.

Appellant further objects to subsection 8 of Section VII of the judgment (*supra,* p. 13), which enjoins appellant from agreeing with its co-conspirators to transfer trade-mark rights upon condition that the latter exclusively grant, receive or exchange technical information, material or machinery relating to antifriction bearings. Appellant contends (Br. 182–183) that this requirement will stop the making of "controlled trade-mark licenses" since appellant as licensor of the trade-mark "Timken" would not be willing

to supply know-how to a licensee knowing that it would have to supply the same information to third party competitors.

The judgment bars such licensing agreements only when made with British Timken or French Timken or a subsidiary, agent, sales representative or distributor thereof. The substance of the contention therefore is that the judgment should leave appellant free to license its trade-mark rights to British Timken and French Timken; upon the condition that they grant, receive or exchange know-how exclusively with appellant. The contention is a repetition of the objections to prohibiting such exclusive exchange, which we have previously answered (*supra*, pp. 149–151).

We submit that judgment provisions relating to trade-marks are essential if the unlawful combination to allocate territories is to be terminated and its recurrence prevented.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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